United States Court of Appeals for the Second Circuit



APPELLANT'S APPENDIX

75-1362

75 - 1362

UNITED STATES COURT OF APPEALS For the Second Circuit

Docket No. 75 - 1362

UNITED STATES OF AMERICA,

Appellee

-against-

ROBERT HOLT,

Appellant.

On Appeal From The United States
District Court For The Eastern District
Of New York

APPELLANT'S APPENDIX

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Carle Place, New York 11514
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		TITLE OF		~ <u>-</u>		ATTORNEYS	
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		vs.		-016	James A.		
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DATE				PROCIEDINGS			
5-14-75	Before MISHLER	CH J -	Indictme	nt filed order	end analad	t	
5-14-75 Before MISHLER, CH J - Indictment filed ordered sealed by the Court.							
5/14/75							
/16/75	Copy of Govt's						- 100 /
	filed	oczec c	nac case	will be calle	d for bles	ding on	5/22/75
5-22-75		IN J - c	ase call	ed - deft & co	unsel I-	ne	
	Bishop present	- deft	arraion	ed and enters	a nles of	Ling	3.
١.	guilty - pre t	rial con	ference	held and concl	a plea of	not	
	\$50.000 PRR -	trial ea	t for A	g. 4, 1975 at	uded - bai	I set at	
2377579	Notice of Readil	earance less for			10:00 a.m.	**	A CHANG
4	Petition for writ of habeas corpus ad testificandum filed						
L2/75	recition for Mi	t of hah	PAR CAPE	10 nd be	and an Ell.		ties

750R 393

DATE	PROCEEDINGS
6/13/75	Petition for writ of habeas corpus ad prosequendum filed
/13/75	By WEINSTEIN, J Writ issued ret. 6/16/75
/18/75	
/23/75	Before WEINSTEIN, J Case called- Deft present-James Passcarella assigned
	as counsel- Order to be submitted- pretrial conference held and concluded
	trial set for 8/18/75 at 9:30 A.M.
/23/75	By WEINSTEIN, J Order appointing counsel filed
/9/75	Writ retd and filed- executed .
7-21-75	Petition for Writ of Habeas Corpus Ad Testificandum filed.
-21-75	By MISHLER, CH J - Writ Issued, ret. July 25, 1975
/22/75	Letter from James Pascarella, esq. and accompanying request to A.US.A. Kaplan for inspection filed
7/22/75	CAVIT
,,,	suppression ret. 7/28/75 at Westbury
100/75	Ahove
<u>'28/75</u>	Before WEINSTEIN, J Case called - Deft not present-Motion argued and grant So Ordered - testimony to be taken on 7/31/75 at 10:00 A.M.
/5/75 8 -6-75	Notice of Motion, ret. 8/8/75 filed re: for Bill of Particulars, etc. Petition for Writ of Habeas Corpus Ad Prosequendum filed.
8-6-75	By WEINSTEIN J - Writ Issued, ret. 8-11-75
8-7-75	Stenographers transcript dated July 31, 1975 filed.
8-8-7	Motion for Bill of Particulars, will be heard on Aug. 13, 1975 at
	10:00 am in Westbury - clerk to inform counsel by telephone.So
	Ordered by Judge Weinstein (see notation of page lof motion papers)
8-11-75	Notice of Motion filed, ret 8-13-75 at Westbury, for suppressing
8-13-75	evidence, for dismissal of 1 and 2 and entire indictment, etc. Before WEINSTEIN J - case called - deft & counsel James Pascarella
	present - motion for Bill of Particulars argued -granted and denied
Lydi	as indicated - So Ordered - defts motion to dismiss counts 1, 2, 3 & 4
	are denied. So Ordered.
8-14-7	Defts Memorandum of Law filed received from Chambers)
8-13-	5 Before WEINSTEIN J - case called - hearing ordered and begun (for
,	declaringelectronic eavesdropping violative of the laws of the State
	of N.Y., etc) 2 depositions marked as Govt Ex. 1 and 2- hearing
	contd to August 18, 1975 at 10:00 am.
-18-75	Before WEINSTEIN J - case called - deft & atty James Pascarella
	present - defts motion to suppress - hearing resumed and concluded -
	decision reserved - defts motion to suppress is denied - Trial ordered

DATE	PROCEEDINGS
8-19-75	By WEINSTEIN J - Order filed that the U.S.Marshal deliver said
	Irving Jones at the expense of the U.S.Govt, under safe and
	secure conduct before the Judges of our District Court within
	and for the Eastern District of NY at 225 Cadman Plaza East
	on August 21, 1975 at 9:30 am thereof or as soon thereafter
	as possible or on any adjourned date to be fixed by the Court.
	Certified copies to Marshal.
8-19-75	Stenographers transcript filed dated August 18, 1975-9:30 am
8-19-75	Before WEINSTEIN J - case called - deft & counsel 3.Pascarella
	present - trial resumed - Trial contd to Aug. 20, 1975 - Govt.
	Ex.#2 and court Ex.2a ordered sealed and placed in vault.
3-21-75	
8-20-75	Refore WEINSTEIN J - case called - deft & atty present -
	trial resumed - trial contd to 8-21=75.
8-21-75	By WEINSTEIN J - Order filed that U.S.Marshal deliver
	Hubert Epps, incarcal ated at Rikers Island Jail, at the
	expense of the U.S.Govt before the Judges of our District
	Court, on the 22nd day of Aug. at 9:30 am or as soon there-
	after as possible, etc.
8-21-75	Before WEINSTEIN J - case called - deft & atty present - trial
	resumed - defts motion to suppress statements - hearing ordered
	and begun Aug 20 and resumed Aug. 22, 1975 - hearing concluded -
	motion denied - courts findings read into record - Govt rests -
	Defts motion to dismiss is denied - trial contd to 8-22-75.
8-22-75	Before WEINSTEIN J - case called - deft & counsel present -
	trial resumed - trial contd to 8-25-75.
25-76	Order retd and filed - executed.
	5 Before WEINSTEIN J - case called - deft & counsel present -
	trial resumed - defts motion for one hour continuance argued -
	motion granted - deft sums up - Govt sums up - Order of
	Sustenance signed -Jury retires to deliberate - Jury returns
	at 5:30 PM to hear part of verdict reread - Jury resumes
	deliberations - Jury to resume deliberations on 8-26-75.
8-26-75	By WEINSTEIN J - Order of sustenance filed (Lunch)
8-26-75	4 stenographers transcripts filed (pgs 95 to 1108)
3 203 /3	Before WEINSTEIN J - case called - deft & counsel James
	Pascarella present - trial resumed - Order of sustenance signed - ary resumes deliberations at 9:20 am - Jury returns at 3:30 PM

DATE	PROCEEDINGS
	and renders verdict of not guilty on count 1 - guilty on counts 2,3 & 4-
	jury polled - jury discharged - trial concluded - deft contd on
	bail - defts motion to set aside the verdict - motion argued - denied -
	case adid without date for sentence.
8-26-7	By WEINSTEIN J - Order of sustenance filed (Lunch)
3-28-7	Voucher for Expert services filed .
/29/75	Stenographer's transcript of Aug. 25, and Aug. 26, 1975 filed.
75/75	Writ retd and filed- executed
-16-75	Letter filed dated Sept. 13, 1975 from Thomas J. Cleveland, Esq.
	counsel for deft
/30/75	
	to 10/10/75 at 9:30 A.M. (so ordered by Judge Weinstein on bottom of lette
0/3/75	Before WEINSTEIN, J Case called - sentence add to 10/10/75 at 9:30 A.M.
0/10/75	Before WEINSTEIN, J Case called- Deft and counsel present- deft's motion
	to postpone sentence denied-deft sentenced to imprisonment for a period of
	10 years on counts 2,3, and 4 to run concurrently plus a special parole term of 5 years on counts 3 and 4 to run concurrently-stay of execution
	of sentence granted pending appeal- bail contd
0/10/7	Judgment and Commitment filed - certified copies to Marshal Notice of Appear filed Notice of motion for taking of testimony of one C. Blackshear filed
	ret. 10/23/75 at 10:00 A.M.
10-17-7	5 Order filed that Record be darkered on or before Nov. 10, 1975.
	5 Before WEINSTEIN J - case called - deft & att6rney J.Pascarella
	present - defts motion to reopen suppression hearing is granted - defts
	motion to set aside the verdict - hearing ordered and begun - hearing
4	concluded - deft & govt rest - defts motion to suppress is denied - defts
	motion to set aside the verdict is denied - Govt to submit order within
	48 hours.
2/24/75	Stenographers Transcript dated 10/23/75 filed
0-24-7	By WEINSTEIN J - Order filed upon all evidence adduced at the
	suppression hearing, trial, and at a hearing held on 10-23-75, it is
	hereby found that no plea negotiations took place except in the presence
	of defense counsel when the deft made no statements and that all state-
	ments made by deft were made voluntarily and after Miranda warnings; and
	Ordered that the defts motion pursuant to 4th, 5th & 6th amendments and
* -	Rule 11(e)(6) for suppression of any and all statements made by deft on
· .	Dec. 17 and Dec. 27 conferences etc. is hereby denied in all respects;
	and it is further thund that no recording was made in violation of defts!

75 CR-393 CRIMINAL DOCKET

DATE	PROCEEDINGS
	constitutional or statutory rights since the wiretape involved
	obtained as a result of a valid order of a New York State Court
	and ordered that the defts motion for a new trial is denied in
	respects (see Order for details)
0/31/75	Voucher for expert services filed
10/31/75	
11-3-75	Stenographers transcript dated Oct. 10, 1975 filed
11-7-75	
	Record on appeal certified and mailed to court of appeals
11-21-75	
11-21-7	Docket entries and duplicate of Notice mAILED to the Court of
	Appeals.
11-24-75	Woucher for compensation of counsel filed. (forwarded to the
	Court of Appeals for approval)
1/28/75	Acknowledgment received from court of appeals for receipt of re
, ; }	

1 -- "

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

ROBERT HOLT,

Defendant.

INDICTMENT

Cr. No. 75 CR 393 (T.21, U.S.C., §173 and 174, T.21, U.S.C., §841 (a) (1),

T.18, U.S.C., §2)

THE GRAND JURY CHARGES:

COUNT ONE

In or about and between January 1969 and December 1972, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, ROBERT HOLT, the defendant, together with Dickie Diamond, named herein as a co-conspirator and not as a defendant, and others known and unknown to the Grand Jury, willfully, knowingly and unlawfully did combine, conspire, confederate and agree together and with each other to violate prior to May 1, 1971, Sections 173 and 174 of Title 21, United States Code, and after May 1, 1971 to violate Section 841 (a) (1) of Title 21, United States Code.

1. It was part of said conspiracy that prior to May 1, 1971, the defendant and co-conspirators willfully, knowingly and unlawfully would receive, conceal, buy, sell and facilitate the

the transportation of quantities of heroin and cocaine, narcotic drugs, after the narcotic drugs had been imported and brought into the United States, knowing the same to have been imported and brought into the United States contrary to law.

- 2. It was further a part of said conspiracy that on and after May 1, 1971, the defendant and co-conspirators knowingly and intentionally would distribute and possess with intent to distribute quantities of heroin, a Schedule I narcotic drug controlled substance, and cocaine, a Schedule II narcotic drug controlled substance.
- 3. It was further a part of said conspiracy that the defendant, while employed as a member of the New York City Police Department, would provide protection to the co-conspirators in the course of the transportation and distribution of narcotic drugs.
- 4. It was further a part of said conspiracy that the defendant and co-conspirators would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities.

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed within the Eastern District of New York and elsewhere:

OVERT ACTS

1. In or about and between January 1969 to December 1969 the defendant ROBERT HOLT had various meetings with Dickie Diamond

named herein as a co-conspirator and not as a defendant, in the Coronet Bar in Brooklyn, New York.

- 2. In or about and between January 1971 to December 1972, the defendant ROBERT HOLT delivered cocaine to one Lillian Day on more than ten occasions.
- 3. In or about and between January 1970 to December 1971, the defendant ROBERT HOLT received quantities of cocaine from one Carol Scott in Brooklyn, New York.

COUNT TWO

In or about and between January 1969 and May 1971, both dates being approximate and inclusive, within the Eastern District of New York, ROBERT HOLT, the defendant, willfully, knowingly and unlawfully did receive, conceal and facilitate the transportation of quantities of cocaine and heroin, narcotic drugs, after the narcotic drugs had been imported into the United States, knowing the same to have been imported and brought into the United States contrary to law. (Title 21, United States Code, Sections 173 and 174; Title 18, United States Code, Section 2)

COUNT THREE

In or about and between May 1971 and December 1972 both dated being approximate and inclusive, within the Eastern District of New York, ROBERT HOLT, the defendant, knowingly and intentionally did possess with intent to distribute quantities of heroin, a Schedule I narcotic drug controlled substance, and cocaine, a

Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841 (a) (1) and Title 18, United States Code, Section 2)

COUNT FOUR

In or about and between May 1975 and December 1972 both dated being approximate and inclusive, within the Eastern District of New York, ROBERT HOLT, the afendant, knowingly and intentionally did distribute quantities of heroin, a Schedule I narcotic drug controlled substance, and cocaine, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841 (a) (1) and Title 18, United States Code, Section 2).

A TRUE BILL.

Foreman.

UNITED STATES ATTORNEY

connection with a police corruption case such as the one that Mr. Holt was involved in?

THE COURT: No, I don't want that.

Next.

Q Was he advised in any way, Mr. Martin, concerning what the nature of cooperation -- what cooperation was, if he was going to cooperate?

THE COURT: I don't want that.

Q Was he given an offer to plead guilty, or was he told there was a possibility that if he fully cooperated that he might be able to plead to a reduced charge?

A Yes.

MR. KAPLAN: I have no further questions.

THE COURT: Thank you. Stepdown.

(Witness excused.)

THE COURT: Any further defense witnesses?

MR. PASCARELLA: No, your Honor, but before the hearing is closed, I want to check out something in yesterday's transcript of the suppression hearing.

THE COURT: All right, the hearing is closed.

The Court finds that there were no offers to plead or accept a plea of guilty. This finding is based upon the statements of the defendant himself, who stated in answer to the Court's questions that he was not

negotiating for a plea of guilty or not guilty. That's confirmed by the witnesses. There was no offer to plead and this was in no way a negotiation with respect to a plea.

Therefore, neither Rule 410 of the Federal Rules of Evidence, nor Rule 11 of the Federal Criminal Rules applies. And neither under these rules or under the common law is there any necessity to exclude the statements as having been made during plea-bargaining negotiations. There were none at this time.

Second, the Court finds that the defendant was fully advised of his Miranda rights on December 17th before he made any inculpatory statements. This is based upon the belief of the Government witness and the disbelief of the defendant on this point.

The Court further finds based on all the evidence that the defendant appeared voluntarily and that he was free to leave at any time, and that he knew at all times that he was free to leave. There was no coercion of any kind. His statements were made voluntarily.

The Court finds that both on December 16th at the time he made the statements and on December 27th

14.

he was fully aware that he had been advised of his Miranda rights and he was himself fully aware of those rights, having given them some 400 times to other defendants.

The Court finds that the defendant was aware and did understand the significance of the waiver of immunity, having been an experienced police officer and having understood the nature of the proceedings. The fact that the defendant was in full control of himself and understood the significance of what was going on is buttressed by the fact that according to his statement he wrote down in full what happened immediately after the meetings of December 17th and December 27te. These are not the acts of a man who has been coerced, who doesn't know fully his rights.

This finding is made without any suggestion that any of the statements made in that writing of the defendant are true. The Court has not examined them and that matter is not before the Court at this time.

All statements made before the grand jury were voluntary. All oral statements made at the December 17th

and December 27th meetings were voluntary.

The defendant was fully apprised of all of his

constitutional rights.

Are there any other findings either party wishes me to make at this time?

MR. MARCUS: No further findings, your Honor.

MR. PASCARELLA: No further findings, your Honor, but I'd like to address myself to a question which was raised by this, if I may.

THE COURT: Based upon the finding of fact and as a matter of law the Court rules that the motion to suppress must be denied.

MR. PASCARELLA: Your Honor, what I want to do is advise the Court of the defendant's position with regard to the rule that your Honor brought to the attention of counsel yesterday. And I think one of the issues that I seek to raise is that in the terms of the rule it applies to pleas of guilty which are withdrawn and offers of a plea of guilty, and the defense contends that it is not meant to cover only offers by a defendant to plead guilty to a particular charge, but it is also meant to apply to offers when they are forthcoming from the Government.

Now, Mr. Kaplan advised yesterday when he told me of what might happen if certain testimony were elicited that the defendant had agreed to plead guilty.

It was then later stated that there was an offer to plead guilty.

Agent McGuire, when he testified, said that the defendant had agreed to plead guilty.

MR. KAPLAN: That was not the testimony.

MR. PASCARELLA: That's why I want to check the transcript. My recollection was that.

THE COURT: There was no offer by the Government to take a plea of guilty. The practice in this District would make such an offer absurd at this time. There was no authority by this Assistant United States

Attorney to make such an offer at this time. And the testimony of the defendant so indicates.

There was no offer by either side. And I do not believe that the defendant himself offered to plead guilty, and I am not going to permit any such testimony to come in because I don't believe it.

MR. PASCARELLA: Your Honor, I don't say that the defendant said that he made the offer or he agreed to plead guilty, but the defendant did say that he was offered a tax count, and that --

THE COURT: I don't believe that. It just flies in the face of everything this court knows about how the district works.

MR. PASCARELLA: Agent Martin testified this morning that he was offered a plea to one count, and that whatever his cooperation was would be made known to the Judge.

THE COURT: I don't believe Agent Martin on that score. I don't think Agent Martin und rstood what was going on. That was not his testimony.

MR. PASCARELLA: And I think if we look at the testimony of Agent McGuire -- and that's why I wanted to look at the transcript -- we'll see a definite statement made with regard to this.

THE COURT: I don't care what McGuire said.

I don't believe it. I think the witness was telling the truth in this respect: There was no offer to plead guilty. There couldn't have been at this time.

MR. PASCARELLA: Is your Honor then believing that the agents gave Miranda warnings to my defendant, and my defendant lied when he said they didn't at a particular time, and then on the same hand your Honor is not believing the agent with regard to what happened regarding a plea, but is believing my defendant when he said that he didn't agree to plead guilty?

THE COURT: That's perfectly normal. I have had a lot of experience in this court and I know what the

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practice is. Your client has had a lot of experience, too, and so has Mr. Kaplan. We are not dealing with neophytes here.

It's completely unrealistic to think that he was offered a plea at this stage before all of this information had been developed. It couldn't have happened. Mr. Kaplan could have been fired for doing that, and he would have been severely chastised by his superiors.

MR. PASCARELLA: Your Honor, this is no way a criticism of any procedures, or even alleging that certain procedures happened. Even if they did, it's in no way a criticism of the procedures.

THE COURT: It's just incredible to the Court that any offer to take a plea was made or that your client accepted any such offer or offered to plead at that time. It makes no sense to me. Your client is an experienced investigator, and Mr. Kaplan is an experienced prosecutor, and that's not the way things happen.

The motions to suppress are denied. Now let's move ahead.

MR. PASCARELLA: Your Honor, there are several -- there are two other matters.

(The following occurred in the absence of the jury.)

THE COURT: Are there any other applications?
MR. PASCARELLA: Yes.

At this time, your Honor, the defense respectfully asks for the removal of a juror and the declaration of a mistrial for the following reasons and on the following basis.

A look through the record of yesterday's proceeding in the morning and the record of the proceeding of the day before, late in the afternoon, which I got sometime yesterday afternoon, indicate that pages 501 and 502, statements by Mr. Kaplan whereby he said, if I sought to elicit from Mr. McGuire on cross-examination that Mr. Holt was cooperative with the Government he would introduce evidence to show that Mr. Holt had agreed to plead guilty to a charge.

Further in the transcript -THE COURT: What is the point of that?
MR. PASCARELLA: I'm coming to it.

Further, at page 527 Agent McGuire in substance testified that a plea was offered to Mr. Holt and then in yesterday's transcript Agent McGuire testified on page 593 that a plea was offered to Mr. Holt and this morning I found out something which I deem it my

obligation to call to the attention of your Honor.

In speaking to a character witness, a policeman, a sergeant, I learned from him he was the one who had occasion to discuss with Mr. Holt in December of 1974 that he was going to speak to Mr. Kaplan.

He said that when Mr. Holt returned he stated to him, "They offered me a plea."

THE COURT: The 17th or 27th?

MR. PASCARELLA: Either one. That Mr. Blackshur has to check his records for.

I think it is all indicia that there was the offer of a plea and, if so, I believe Rule 11(6)(e) comes into play.

THE COURT: I am not going to hold a hearing now.
We had a hearing.

If your client is convicted then I will entertain a motion for a hearing.

I warned you and I brought it to your attention
Rule 11(6)(e) the night before the hearing so you could
consult with your client about the matter and you
failed to introduce any testimony except your client's.

MR. PASCARELLA: I understand that but this came to my attention just now.

THE COURT: I am not going to re-open the hearing at this moment, at 11:25. I have a jury here and a

tight calendar.

If your client is convicted I will of course entertain an application to re-open that hearing on a motion to suppress.

However, I don't understand your motion for the withdrawal of a juror.

MR. PASCARELLA: I make that motion because I think there is a good deal of evidence that got in which would not have gone in otherwise.

I don't think the oral statements would have been allowed in or the Grand Jury testimony and without that the tapes would not have been allowed.

THE COURT: Well, that is a motion to suppress.

MR. KAPLAN: For the record, Judge --

THE COURT: I prefer not.

MR. KAPLAN: There has been an egregious misrepresentation. It seems I should be allowed to state on the record what my statements, prior statements indicated as to whether there was an offer of a plea.

THE COURT: I really don't care to hear about it now.

I held a full hearing and I decided the issue on the evidence available. If there is new evidence, I will hear it subsequently but not this morning.

MR. PASCARELLA: Your Honor, one more item.

In questioning by Mr. Kaplan yesterday he brought out various Police Department charges but more particularly, charges of false statements, charges
Mr. Kaplan knew were dismissed since he had the same report I had before him.

These charges were dismissed as not being founded. The fact that this came out before the jury goes to the credibility of Mr. Holt and would prejudice them in evaluating his testimony.

THE COURT: I don't see how we can avoid a rather full inquiry by the Government based on the credibility of the witness.

I allowed you the broadest freedom in establishing the defendant's good record as a policeman. I deliberately did that because I thought it was fair to the defendant to allow him to put himself in the best possible posture before the petit jury that he could. Since he did present himself as a man of unblemished character and a great policeman with all these decorations and other things, I think the Government properly had to be afforded rather free attack on credibility.

The same thing is true with the Government's witnesses. I afforded you the greatest freedom in attacking their credibility because credibility is

.

the issue in the case.

I don't see how we can avoid all this. It seems to me you opened it all up --

MR. PASCALELLA: Well, your Honor --

THE COURT: (Continuing) -- and the possible prejudice with respect to what happened at the December 17th and December 27 meetings in this court-house were introduced by you in your direct examination. It was your client who brought to the jury's attention the fact that Mr. Kaplan thought that your client was a corrupt cop. You opened that whole business up, not the Government.

MR. PASCARELLA: I directed my questions to my client based on the responses of Mr. McGuire who testified first. But, that is not the point I am making with respect to that.

I am saying, as a matter of law, under the rules, the evidence should not have come in.

THE COURT: I understand that position but I ruled against you as a factual finding and I won't hold a hearing at 11:30 this morning. I have a jury and other cases behind it.

MR. PASCARELLA: Again, I point out that I just found this out this morning.

Now, as to the false statements your Honor said

if the Government is free to bring up the charge it is only a charge. But in this case it's a disposition something that was dismissed and I think that is totally unfair.

MR. KAPLAN: That testimony was stricken.

THE COURT: Point to the record.

MR. PASCARELLA: I just got a copy of the transcript, your Honor. I haven't found it.

THE COURT: Well, if you find it and you ask for corrective measures I will do what needs to be done. But, you have to show me something.

MR. PASCARELLA: Yes, I will. It will be a moment before we find the spot in the record.

Shall we bring the matter to your Honor's attention later?

THE COURT: I prefer to go on to the trial.

When you bring something to my attention I will instruct the jury.

I have told you on two occasions at least,
previously, bring these matters to my attention at
the time of occurrence so I can instruct the jury
forthwith. It doesn't do much good to rest overnight
and come back with afterthoughts --

MR. PASCARELLA: The fact of the matter is it still happened. I objected during the course of

- 11		
1	14	THE COURT: And you?
2		MR. KAPLAN: I would think an hour and a half,
3		Judge.
4		THE COURT: So the charge shouldn't take more
5		than a half hour, so we should go to the Jury by lunch-
6		time.
7		All right, have your witnesses here.
8		MR. PASCARELLA: May I also point out to your
9		Honor the section that I wanted to point out before
10		in the minutes.
11		THE COURT: Yes.
12		MR. PASCARELLA: Might I explain also that the
13		minutes were taken back to be renumbered, I mean
14		the transcript.
15		THE COURT: Yes.
16		MR. PASCARELLA: And what I am talking of was
17		at page 793 where Mr. Kaplan asks a question of
18		Mr. Holt, "Sir, were you ever charged with
19		making a false statement in the course of that
20		official investigation?"
21		Now, I objected to that, to anything that he
22		was charged with. And you said "If he was charged and
23		not convicted, I don't want it."
24		However, that still came out, it still went
25		into the minds of the Jury, and making false statement

I think, goes directly to the credibility of the witness.

THE COURT: No, I have instructed the Jury on at least three occasions that I can remember and perhaps more often that the asking of a question is not what counts, it is the answer.

And any time you want that, I have told you repeatedly, ask for it and I will give it.

MR. PASCARELLA: I understand that, and your Honor --

THE COURT: I sustained your objection. I don't know what you are complaining about.

MR. PASCARELLA: The fact that I was complaining about was that it came out when it did.

Now, if Mr. Kaplan had a sheet in front of him and in good faith didn't know it was dismissed, that is a horse of another color, but I think a lot of the appeals cases have said where the prosecutor doesn't have some substantial backing for what he is about to say, it shouldn't be gone into. And I suggest that it was brought in merely to attack his credibility and get it into the mind of the jurors.

THE COURT: I must say that I think that the case has been very fairly tried on both sides. It is a difficult case and I don't expect perfection of

1	21 Bishop
2	THE WITNESS: No, I am not upset.
3	THE COURT: I didn't think you were.
4	Good night. Thank you very much.
5	(Witness excused.)
6	THE COURT: Any further witnesses for the
7	defendant?
8	MR. PASCARELLA: Your Honor, with the provi-
9	sion discussed at side bar, the defendants rest.
10	THE COURT: Does the Government have any
11	rebuttal?
12	MR. KAPLAN: Yes, the Government has a witness,
13	your Honor, in rebuttal.
14	MR. PASCARELLA: Your Honor, may I ask for
15	a side bar at this point.
16	THE COURT: Yes, get the witness first.
17	(The following occurred at side bar.)
18	MR. PASCARELLA: I would just like to note
19	on the record that your Honor had directed me to reveal
20	the names of my witnesses and you had asked Mr. Kaplan
21	to provide me with certain material.
22	That has not been provided and I don't know
23	who is being called.
24	THE COURT: Who are you calling?
25	MR. KAPLAN: I just got the witness two weeks

ago, Michael Paden, Deputy Medical Examiner of 1 22 the Examiner's Office of the City of New York. 2 3 THE COURT: What's he going to testify? 4 MR. KAPLAN: He's going to testify to the whole 5 thing elicited about cocaine and what the effects of cocaine are. And all that testimony is going to 6 come out from a medical examiner. 7 8 MR. PASCARELLA: If I had known something about 9 this, we could have prepared. I am going to have to 10 ask for a continuance. THE COURT: You will not have any continuance. 11 You have gone into it the whole day with 10 witnesses. 12 MR. PASCARELLA: I have gone into it with 13 people on the street, not --14 THE COURT: What do you expect the Government 15 to do? You know enough about drugs to know that 16 a good deal of that testimony was nonsense, 17 MR. PASCARELLA: I don't think a good deal of 18 it was nonsense, your Honor, and I am quite familiar 19 with the drugs, I have handled 200 drug cases. 20 THE COURT: Of course, you have people who 21 take cocaine on a fairly regular basis and you cant' 22 tell them by looking at them. 23 We'll have a witness and then we'll close the 24

Where is the witness?

25

case.

1	12 THE COURT: Thank you. You can wait here
2	just a moment, doctor.
3	Thank you very much, ladies and gentlemen.
4	Don't discuss the case. Be here at 10:00
5	o'clock Monday. Tell your families you may stay
6	a little late on Monday night.
7	Have a pleasant weekend.
8	(Jury leaves the Courtroom.)
9	THE COURT: Thank you very much. I'm sorry to
10	have brought you in this late.
11	Counsel remain however. I have things to
12	say.
13	If the defendant wants to put on an expert
14	witness to rebut what this witness has said, I will
15	take it Monday morning. 10:00 o'clock.
16	MR. PASCARELLA: It is going to be very diffi-
17	cult at this time, your Honor, to arrange for a medica
18	witness Monday morning.
19	It is 6:30 now and before we finish with your
20	Honor, it will probably be later.
21	THE COURT: Not much later.
22	MR. PASCARELLA: I have someone in mind but by
23	the time I get back maybe I can reach him now,
24	but I may not be able to get him for Monday morning.
25	I may be able to get him for Monday afternoon.

♥ ○ .

1	13 THE COURT: Monday afternoon, I'm afraid, it
2	will be all over.
3	MR. PASCARELLA: Unfortunately if the Govern-
4	ment had told me earlier they were going to call
5	this witness, I could have had one.
6	THE COURT: If you have a treatise, I will
7	take it, but I think you will find that most toxi-
8	cologists, most pathologists, will support what this
9	witness has said. He's probably the most learned man
10	in the field in this area.
11	MR. PASCARELLA: I am aware of his qualifications
12	your Honor. But I also know that many of his views
13	are not shared by others.
14	THE COURT: I understand, there are always
15	two sides at least to every storey.
16	MR. PASCARELLA: That's true, in fact it may
17	be more than 50-50 who do not share his view.
18	I am very familiar
19	THE COURT: All right, you all be here at
20	9:30 so we can go over the charge and if you have
21	any witnesses, have them here at that time.
22	We'll have summations in the morning.
23	How much time would you require for summation?
24	MR. PASCARELLA: I would say in the vicinity
25	of an hour.

(Jury not present.)

THE COURT: All right, gentlemen, come to the front bar.

Let's go over this charge.

MR. PASCARELLA: Your Honor, before we go over the charge, I have something to bring to the Courts attention.

This has to do with the last witness called,
the Dr. Paden. Over the weekend I tried to get a
medical expert and I hope, because of the time we left
on Friday over the weekend, it was difficult to get
a doctor. I managed to speak with several of them and
I managed to get views of several of them including
Dr. Lubash, the Medical Examiner of Nassau and
Dr. Rarki, Chief Medical Assistant, the Chief Assistant
Medical Examiner and also the views of Dr. Milton
Halpern who was the former Medical Examiner of New
York County and at 1 o'clock I'm supposed to be
speaking with a Dr. Sang from the Drug Center in
Kings County.

These opinions vary with the opinions expressed by Dr. Paden.

I think in light of the impact that his testimony might have with regard to the testimony of the Police Officers who testified with regard to the symptoms of

the drug in their opinion, they didn't think
Mr. Holt took the drugs.

I think it is important. I think that it would be appropriate for the Court to grant some short continuance until I get one of these witnesses.

I would say -- I was on the phone with some of them all hours last night. I waited for Dr. Lubash to come back from a holiday last week and I spoke with him and what he would be willing to testify to, but he's tied up today.

I spoke to Dr. Sang, he may be able to testify this afternoon.

There is a possibility of getting a witness who had credentials at least as long as or longer than Dr. Paden --

THE COURT: Did you follow my suggestion that you get a treatise?

MR. PASCARELLA: Your Honor, I looked in the Medical Library and I don't think it has the same effect as having an expert on the stand, just telling them something that is in a book, you can find almost anything in a book.

THE COURT: What is the Government's position?

MR. KAPLAN: The Government's position is that
the defendant had an opportunity to adduce medical

and even during the trial and made a Rule 16-c motion for the medical information. They went on subpoenas to doctors. They knew this was going to be the case all along and they put on 12 witnesses and the Government was put in jeopardy and we didn't know about this testimony, we had to get a doctor. It: doesn't seem that the defense is prejudiced. The Government was prejudiced.

MR. PASCARELLA: What Mr. Kaplan stated is untrue.

THE COURT: Move ahead.

MR. PASCARELLA: I would like to set the record straight.

THE COURT: If you have a witness before the case goes to the jury, I will take a motion to open the evidence and I will take judicial notice that there are contrary views on this matter.

MR. PASCARELLA: May I make the record clear, the defense did not subpoena any doctors. The records that we got were part of Mr. Holt's medical history, the Police Department records of his --

THE COURT: It doesn't make any difference.

Gentlemen, I want to go ahead with the charge.

What do you have on page 1?

MR. PASCARELLA: Just a point to clarify, I'm not sure what your Honor's ruling was, may I be able to --

THE COURT: I want to go ahead with the charge.

You can argue any way you wish to the jury,

including telling the jury that there are contrary

medical views, I will take judicial notice of that.

MR. PASCARELLA: Would I be able to go to the extent saying I tried to get medical testimony and who the witnesses are?

THE COURT: No.

You can say there are other eminent medical witnesses who take contrary views. You can't mention the names. Obviously, you don't know whether any of them are going to testify to what you say.

I will take motions to re-open before the case goes to the jury.

MR. PASCARELLA: May I indicate they weren't available for this morning?

THE COURT: No. Move ahead.

MR. PASCARELLA: Your Honor, I think the defense is seriously prejudiced in the eyes of the jury.

THE COURT: Move ahead.

MR. PASCARELLA: I have a copy of the request

with intent to distribute and the distribution count rather than leaving it as the possession alone.

THE COURT: All right. Anything further?

MR. PASCARELLA: No, Your Honor, but I take

it that the fact -- there is something further on
the charge than what we have gone through so far,

I take it will not act for the Government's prejudice
in that it is duplications as to the first charge.

In other words, by not raising objections, I do not
want it to be thought there is no objection to it
being laid out as a single conspiracy.

Is your Honor going to charge with regard to the medical expert?

THE COURT: If you want me to.

MR.PASCARELLA: I found out that there are witnesses with credentials as long as Dr. Badens, who have disagreed with him and that should be included.

THE COURT: I will say "you heard from a medical expert, other experts have contrary views." --

MR. PASCARELLA: In fact, from what I have learned so far, it is not even the majority view.

THE COURT: "You should evaluate the credibility of this expert the way you would any other witness."

Is that what you want?

MR. PASCARELLA: I think we would request an

additional -- while they could evaluate, they have no one to compare him with. We could not produce our own medical expert.

THE COURT: That is not so, you could have produced your own medical expert.

MR. PASCARELLA: This happened at the end of the day on Friday.

THE COURT: I don't understand that. You knew this was going to be a major part of your defense.

You had 12 witnesses who came in and testified to this event. This was set up in relation to your whole tactics in presenting the trial.

If you want a continuance, I will break and pick another jury. I don't think it is worth while. I think you are just trying to make a record, but if that is what you rish, I will do it.

MR. KAPLAN: We object. They had three days -MR. PASCARELLA: The three days being Friday,
Saturday, and Sunday.

THE COURT: I will grant your continuance until 11:30.

MR. PASCARELLA: Thank you.

(Recess taken.)

(Continued next page.)

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	RS/ffe	(After recess.)
0	3 a.m/1 ²	(Jury not present.)
	3	THE COURT: Come forward, did you get your
	4	medical witness?
	. 5	MR. PASCARELLA: No, your Honor. We are not
	6	able to obtain one.
٠.	7	THE COURT: Are you going to have one within
	8	a reasonable amount of time?
0	9	MR. PASCARELLA: It's difficult to say.
	10	There is one but he won't be able to be here until at
	11	least 12:00 o'clock. That is what we are told.
	12	THE COURT: Your co-counsel is trying to get
	13	them.
	14	I told you if you want him to testify I will
	15	consider after argument under the circumstances, but
	16	I've given you as much time as I can.
	17	Maybe I can by selecting a jury in the other
	18	case so that Mr. Washor can get away.
	- 19	MR. KAPLAN: We have a Jury sitting in the
	20	jury room for the whole morning.
	21	THE COURT: I understand that.
	22	We have a lot of cases to handle and I have
	. 23	to handle Mr. Washor's physical impairments.
	24	MR. KAPLAN: There's no way we can go ahead
0		

with the summation?

THE COURT: Sure. But I won't be able to select a jury. You have to get away?

MR. WASHOR: I would appreciate it if I could get away --

THE COURT: I suppose we can select a jury during the lunch hour. I'll just skip my lunch.

call down and tell them to send the jury panel out of lunch now and we'll have them up here at 1:00 o'clock and we'll select a jury in this case at 1:00 o'clock. The Fox case and I will go ahead with summations on the Holt case immediately.

MR. PASCARELLA: Your Honor, going by the discussion we had on Friday the summations would take some two and a half hours worth of summations?

THE COURT: I know, Mr. Kaplan, mine will be an hour, so we'll be only two hours.

Thank you very much gentlemen.

Prepare for your summations.

(Continued on next page)

THE COURT: Ladies and gentlemen take a five minute stretch and then I will charge you.

(Recess taken at 3:35 p.m.)

(Jury entered the Jury Box at 3:40 p.m.)

THE COURT: Ladies and gentlemen of the Jury,
I am now going to instruct you on the law that applies
in this case. I want you to follow these instructions.

You and you alone are going to be responsible for deciding the facts. You are the sole judges of those facts.

I myself have no view as to the guilt or innocence of this defendant. Nothing that I have said or done during the course of the trial should lead you to believe that I have any such view.

What we want you to do is decide this case only on the evidence you have heard or have seen or will see and on the law as I will now describe it to you.

The fact that the prosecution is brought in the name of the United States does not entitle the Government, that is the prosecution, to any greater consideration than any other litigant would have.

In this court everybody is equal and no party is entitled to any sympathy or favor.

The indictment is merely a way of bringing a charge into Court. It is itself no evidence of guilt and is entitled to no weight in your deliberations.

The defendant has pled not guilty. That means that the Government has the burden of proving guilt beyond a reasonable doubt with respect to every element of each of the four crimes he is accused of committing.

A defendant does not have to prove his innocence.

He need not submit any evidence at all. He need not take the witness stand. A presumption of innocence remains with the defendant throughout the trial and must be considered by you in your deliberations.

A reasonable doubt means a doubt sufficient to cause a prudent person to hesitate to act in the most important affairs of his life. A reasonable doubt may result from evidence or from lack of evidence.

Finding an individual to be guilty of committing a felony and subjecting him to the possibility of criminal penalties is most serious and you will consider this fact in determining whether or not you have a reasonable doubt.

Nevertheless, if at the end of the trial you are convinced beyond a reasonable doubt that the defendant is guilty of the crime charged then you

R.S. 23

should find him guilty of that crime. If you are not convinced beyond a reasonable doubt then you should acquit.

This defendant is charged with four counts of crimes and each one has to be considered separately by you.

Each one of the counts relates to crimes
referring to heroin, a Schedule 1 controlled substance, and cocaine, a Schedule 2 controlled substance

It is not necessary for you to find that violations occurred with respect to both heroin and cocaine. If there was a violation with respect to either one that is sufficient.

(To be continued on next page.)

.../LH lpm/1

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Now Count 1 is the so-called conspiracy charge.

I'm going to read the charge to you.

The or about and between January, 1969 and December, 1972, both dates being approximate and inclusive within the Eastern District of New York and elsewhere, Robert Holt, the defendant, together with Dickie Diamond, named herein as a co-conspirator and not as a defendant and others known and unknown to the Grand Jury, wilfully, knowingly and unlawfully did combine, conspire, confederate and agree together and with each other to violate prior to May 1st, 1971, Sections 173 and 174 of Title 21, US Code, and after May 1st, 1971 to violate Section 841(a)(1) of Title 21 US Code.

May 1st, 1971, the defendant and co-conspirators wilfully, knowingly and unlawfully would receive, conceal, buy, sell and facilitate the transportation of quantities of heroin and cocaine, narcotic drugs after the narcotic drugs had been imported and brought into the United States, knowing the same to have been imported and brought into the United States contrary to law. It was further part of said conspiracy that on and after May 1st, 1971, the defendant and co-

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conspirators knowingly and intentionally would distribute and possess with intent to distribute quantities of heroin, a Schedule 1 narcotic drug controlled substance, and cocaine, a Schedule 2 narcotic drug controlled substance.

"It was further a part of said conspiracy that defendant, while employed as a member of the New York City Police Department would provide protection to the co-conspirators in the course of the transportation and distribution of narcotic drugs.

"It was further a part of said conspiracy that the defendant and co-conspirators would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities.

"This count of the indictment charges a conspiracy to violate 21 US Code Section 173 and 174before May 1st, 1971 and on or after May 1st, 1971, a conspiracy to violate Section 841(a)(1) of Title 21 of the US Code.

*Sections 173 and 174 make it a crime to knowingly import or bring into the United States any narcotic drug, or to receive, conceal, buy, sell or facilitate the transportation, concealment or sale of any such narcotic drug. Section 841(a)(1) makes

it a crime to knowingly or intentionally manufacture, distribute or dispense or possess with intent to distribute or dispense a narcotic drug."

There is only one continuing conspiracy, that is charged but the law was changed effective in 1971 and that's why the charge in the indictment relates to May 1st. That's when the law was changed, but there is only one count charging conspiracy which is alleged in the indictment beginning in 1969 down through 1972 which is so charged.

Now the Government need not prosecute all of, the persons involved in a conspiracy.

If you analyze the charge, the charge and the law, what you find is that the Government has to prove four elements beyond a reasonable doubt.

First that there be two or more persons involved.

You can't have a conspiracy with yourself.

Secondly, that they wilfully and knowingly
conspire or agree.

Third, that they conspire to commit an act which is unlawful and,

Fourth, that one of the members of the conspiracy did an act to effect the object of the conspiracy.

What is a conspiracy? A conspiracy is a

combination of two or more persons to accomplish an unlawful purpose or a lawful purpose by unlawful means. While it involves an agreement to violate a law it is not necessary that the person charged entered into an express formal agreement or that they stated orally or in writing what the scheme was or how it was to be effected.

It is sufficient to show that they came to a mutual understanding to accomplish an unlawful act.

And what is the essence of the conspiracy,
the common design is the essense of the conspiracy.
This may be shown by proof of concert of action in
the commission of an unlawful act which a plan or
common design or an agreement can be inferred. So,
if this defendant agreed with one or more persons
to receive, conceal or facilitate the distribution
of heroin or cocaine allegedly involved in this case,
knowing it to have been brought into the United
States contrary to law, then there would be a conspiracy.

Remember, it is one large conspiracy extending over a period of three years that is charged. If you find not a single conspiracy but a series of small conspiracies, then the defendant must be acquitted of the conspiracy count.

The fact that there are two statutes involved in time, one before May, 1971 and one after May 1st,

1971 does not create separate conspiracies. It is actually a single conspiracy. And the gist of the charge is that there is an agreement to commit an unlawful act.

Just because there are several statutes doesn't make it two conspiracies.

So if you find there was one continuing conspiracy, the defendant need not be a party to the conspiracy from its inception or to its end, so long as all the elements are proven beyond a reasonable doubt.

That is to say, you have an ongoing conspiracy and somebody can join it or leave it at anytime. He is still a member of that conspiracy if he knows it is a continuing conspiracy and if he joins it.

ordinarily this kind of criminal conspiracy is characterized by secrecy, so it may be inferred from the circumstances and the conduct of the parties as you find they exist. Mere innocent association as for social purposes as testified by the defendant or even physical contact with conspirators does not make a person a co-conspirator.

Charge

The extent of the defendant's participation is not determinative of his guilt or innocence. The defendant may be convicted as a conspirator even though he plays a relatively small or minor roll in the conspiracy.

So as long as he knows he's helping in the overall conspiracy and is not just doing an isolated criminal act. It's not essential that he participate in all the activities.

(Continued on next page)

It is sufficient to show the conspiracy if he joins in it and contributes his efforts in furtherance of it. A single act by the defendant is sufficient to bring him within the ambit of the conspiracy, provided your finding that the defendant knew about the conspiracy and he associated himself with it in an attempt to make it succeed.

Now, let me say a few words about wilfully and knowingly because I have used those words and I will use them again.

An act is not done knowingly if it's done involuntarily and unintentionally. It has to be a voluntary act done intentionally and it's not done knowingly, if it arises from a mistake or negligence or any other innocent reason. Mere stupidity is not enough. An act is done wilfully if the defendant acts voluntarily and intentionally and with the specific intent to do something that the law forbids. That is to say, with a bad purpose, either to disobey or disregard the law.

In the law here, the bad purpose would be to conspire to traffic unlawfully imported narcotics knowing them to be unlawfully imported.

So you have to determine not only whether the

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defendant participated in the conspiracy, but whether he did it with knowledge of its unlawful purpose, that he joined it with the awareness of the basic aims and the purposes of the conspiracy.

In order to determine that, you're going to have to try to infer what his state of mind was as revealed from the evidence in the case. If you find that he knew bout a conspiracy but didn't do anything to join that conspiracy, that cannot be sufficient. What is necessary is that the defendant participate, with knowledge at least of the purpose of the conspiracy and with intent to aid in the accomplishment of those unlawful ends.

The third element that the Government must prove beyond a reasonable doubt is that the conspiracy be to commit an unlawful act. Possessing cocaine or heroin, knowing it to be unlawfully imported with the intention to distribute it was unlawful during the entire period charged. From 1969 to 1972. The Government must prove that the drugs were unlawfully imported to the knowledge of the defendant.

If this was a conspiracy to illegally distribute at wholesale and retail and the defendant knew it as testified to by Dicky Diamond and McArthur Egister

but denied by the defendant, obviously you could find the conspiracy was in the words of the indictment, to receive, conceal, buy, sell and facilitate the transportation of quantities of heroin and cocaine. And to distribute and possess with intent to distribute these narcotics.

Now, I will say more about the substantive law and with the substantive counts in a few moments.

But the problem of illegal importation does require a bit of explanation and I think I ought to give it to you now.

So far as we know, practically all heroin is illegally imported. You probably know that from your general knowledge. That it comes from places like Viet Nam, where the poppies are grown, and it's reduced to heroin form abroad and imported in that form to this country. There may be some of it produced here but we think all of it comes from abroad.

It's obviously easier to import and smuggle a drug in its refined form rather than the original poppy form or any intermediate form. So the heroin is, for all practical purposes, as far as we know, brought in illegally, smuggled into the country and you can draw what inferences you believe are reasonable from

this defendant's background, from what he should have known and did and in fact know what he did and in fact know under the circumstances.

Now, some cocaine, however, is manufactured in this country for medicinal purposes. It's manufactured under very strict control. So far as we know, most of the cocaine used in illegal enterprises is illegally imported. That of course is particularly true of cocaine dealt in by criminals and in substantial quantities, cocaine in quantity & kilos. Then broken down into smaller quantities, comes as far as we know, from abroad.

in narcotics was offered to show that the defendant would have known that Diamond and Bynum and others were dealing illegally in imported narcotics. That is, that the narcotics that he had, if you find that he had any that were not manufactured here but were illegally imported and he knew that and the nature of the dealings described in bars and elsewhere can be considered by you in deciding if any cocaine involved was illegally produced in this country for medicinal purposes.

The fourth element that the Government must

establish beyond a reasonable doubt is that there be an act to effectuate the conspiracy. This is called an overt act. An overt act is required since under our law, we don't make out an illegal crime to merely talk about something or decide you're going to do it, something has to be actually done to carry it out. It's not necessary that all of the other overt acts charged in the indictment were performed, one overt act is sufficient and an overt act means an act committed by one or more of the co-conspirators to accomplish the purpose of the conspiracy.

An overt act need not in itself be a violation of the law and the other co-conspirators need not join or even the defendant doesn't have to enter into it or even know it's taking place so long as that there is an act in furtherance of the objective of the conspiracy.

Now, there is charged overt acts, and you have to find one as follows:

In or about and between January 1969 to December 1969 the defendant Robert Holt had various meetings with Dicky Diamond, named here as a co-conspirator and not as a defendant, in the Coronet Bar in Brooklyn, New York.

Two. In or about and between January 1971 to

December 1972 the defendant Robert Holt delivered

cocaine to one Lillian Day on more than 10 occasions.

The number of occasions isn't critical.

Three. In or about and between January 1970 to December 1971, the defendant Robert Holt received quantities of cocaine from one Carol Scott.

If you find beyond a reasonable doubt all the elements of the conspiracy charged in the indictment as to this defendant and that during the existence of the conspiracy one of the overt acts alleged as knowingly done by one or more of the co-conspirators in furtherance of some objective of the conspiracy was performed, proof of a conspiracy offens is then complete.

It is complete as to the particular defendant if he is found beyond a reasonable doubt to have been knowingly and wilfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators committed the overt act.

Now, of course I do not suggest that any of these overt acts were actually committed. You're going to have to decide that in connection with this case.

Now I will read you the second count of the

In or about and between January 1969 and May

In or about and between January 1969 and May 1971, both dates being approximate and inclusive, within the Eastern District of New York, Robert Holt, the defendant, wilfully, knowingly and unlawfully did receive, conceal and facilitate the transportation of quantities of cocaine and heroin, narcotic drugs, after the narcotic drugs had been imported into the United States, and knowing the same to have been imported and brought into the United States contrary to law. This was between January 1969 and May 1971,

when I said the law changed.

Now the law reads in material part as follows:

"Whoever knowingly receives, buys or in any other manner facilitates the transportation, concealment or sale of any narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, shall be guilty of a crime."

There are four elements to this substantive crime.

First, that the defendant received or in any manner facilitated the concealment or transportation of heroin or cocaine.

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Second, that this had been brought into the United States contrary to law.

That the defendant knew that these narcotic drugs had been imported or brought into the United States contrary to law and, fourth, that he acted knowingly and wilfully.

As to the first element, the Government must establish beyond a reasonable doubt that it was heroin or cocaine which was involved and that the defendant concealed or received or transported the drug.

It is the theory of the Government that the substance sometimes described as white powder or crystalline powder involved was heroin or cocaine and there was testimony about sniffing of it, its use,

narcotics by those who dealt in or used them.

As to the second and third elements, Section 173 of Title 21 of the United States Code in effect forbids and makes unlawful the importation of narcotic drugs in any way or manner, except for legitimate medical purposes.

Heroin does not have a legitimate medical purpose and cocaine has a very limited medical purpose.

As I have explained to you, if you found that

beyond a reasonable doubt the narcotic drug involved was brought into the United States for any other purpose other than a legitimate medical purpose, the second element of the crime is satisfied and I have told you something about that in connection with the conspiracy.

Now, as to the fourth element, the Government must prove beyond a reasonable doubt that the defendant acted knowingly and wilfully and I have already told you what those terms meant.

Now, this second count also charges the defendant with a violation of Section 2 of Title 18 of the United States Code. That reads, "Whoever aids, abets, counsels, commands, induces or procures the commission of an offense against the United States is guilty of that crime, as if he committed the offense himself.

That is, if you aid or abet somebody else, you're guilty as if you committed the crime yourself.

In order to have aided or abetted another to commit a crime, it is necessary to find that the defendant wilfully joined in the criminal venture and wilfully participated in it, as he would in something he wished to bring about. Thus, to find the defendant

Charge of the Court

guilty of Count Two as an aider or abettor you must find the Government has shown two things beyond a reasonable doubt:

Pirst, that another individual knowingly and unlawfully received, concealed or facilitated the transportation of cocaine or heroin, knowing it would be imported into the United States contrary to law.

Second, that the defendant wilfully aided and abetted, counseled, commanded or induced or procured this individual to commit the crime.

So in order to determine whether somebody is an aider or abettor, you have to ask yourself such questions as the following:

Did he associate himself with the illegal venture?

Did he participate in it as something he wished to bring about?

Did he seek by his actions to make it succeed?

If he did, then he is an aider and abettor.

To summarize, you may find that Mr. Holt is guilty of Count Two if you find that he himself knowingly and intentionally received, concealed or facilitated the transportation of heroin or cocaine as by giving it, even in small quantities, to others

or that he aided or abetted another to do so, as by riding shotgun for Diamond or giving protection, to facilitate the violation of this narcotic law.

Now, Count Three, the possession count, reads as follows:

(Continued on next page.)

THE COURT: (Continuing) "In or about and between May 1971, and December 1972," that is after the law changed, "both dates being approximate and inclusive within the Eastern District of New York, Robert Holt, the defendant knowingly and intentionally did possess with intent to distribute quantities of heroin, a Schedule I narcotic drug controlled substance, and cocaine, a Schedule II narcotic drug controlled substance."

This charges the defendant with possession of heroin or cocaine with intent to distribute in violation of Section 841(a)(1) of Title 21 of the United States Code.

That section reads as follows:

"It shall be unlawful for any person knowingly or intentionally to possess with intent to distribute, a controlled substance."

Heroin and cocaine are controlled substances within the meaning of this statute.

There are three elements to this crime. First, that the defendant did in fact possess cocaine or heroin during that period. Possession could be of small quantities for personal use or a few individuals or for himself.

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But possession for personal use alone is not with intent to distribute.

This requires that you possess it with the intention to distribute.

Second, you must find that he knowingly or intentionally possessed the heroin or cocaine as I've explained these terms, that is he knew it was cocaine and willfully possessed it.

Third, you must find that beyond a reasonable doubt that the defendant intended to distribute the heroin or cocaine if you find that he possessed it.

Now by distribution we mean merely to deliver.

Deliver has a simple and clear meaning. It means to transfer over. To turn it over to somebody else. It doesn't mean necessarily to sell it. It doesn't have to be sold. It can be given away.

In order to convict the defendant of this count you may find that he did the criminal acts himself or that he aided and abetted another to do so.

So that is he had to possess it with the intent to distribute.

Count 4 is the distribution count.

It reads as follows:

"In or about and between May, 1971 and

December, 1972, both dates being approximate and inclusive, within the Eastern District of New York, Robert Holt, the defendant, knowingly and intentionally did distribute quantities of heroin, a Schedule I narcotic drug controlled substance, and cocaine, a Schedule II narcotic drug controlled substance."

This count charges the defendant with distribution in violation of part of Section 821(a)(1)

Title 21 of the United States Code which reads as follows:

"It shall be unlawful for any person knowingly or intentionally to distribute a controlled substance."

Again, heroin and cocaine are such controlled substances. There are two elements to this crime.

First, that the defendant or somebody with whom the defendant was acting in concert, that is he was aiding and abetting, acted knowingly and intentionally. I explained those terms to you.

Second, that the defendant or someone with whom the defendant was acting in concert did in fact distribute heroin or cocaine.

As I told you, that has a very simple meaning.

It means to hand it over or transfer it, whether for

money or not. It doesn't make any difference how large or small the quantities are.

I said that the defendant or someone with whom the defendant was acting in concert is enough. That is because the guilt of the defendant may be established without proof that he personally did every act constituting the offense charged, that he aided and abetted another in the distribution of heroin and cocaine. I explained that.

Now those are the four crimes charged.

During the course of the trial there was some reference to an interview of this defendant in this building. Any expression of the views of the Government agentsor attorneys with respect to the guilt or innocence of this defendant are entitled to no weight whatsoever.

There was also reference to criminal charges against witnesses and a departmental hearing involving the defendant. These matters were explored only on the issue of credibility and it doesn't make any difference what happened there with respect to the defendant's guilt or innocence, he's not charged with doing anything except those four crimes I have told you about.

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There was also reference to bars and to afterhour clubs and sexual and drug relationships which
may have shocked some of you or all of you but
remember, you are not being asked to pass judgment
on the way of life of this defendant or any other
person you heard about in this case.

The defendant is not being charged with snorting cocaine or with being a bad policeman or doing things he shouldn't have done with a girl friend or anything else.

He is charged with these specific crimes and that's what you have to decide, whether he violated these laws as I have described them to you and you have to find it beyond a reasonable doubt.

Now the critical problem for you is obviously to decide who to believe and how much weight should be given to the documents and tapes and the various witnesses and you are going to use your common sense and experience in coming to a conclusion with respect to these matters. Even though you may not personally be familiar with the way of life described or the language that was described and so on.

You are all reasonable and mature human beings and you should be able to draw a reasonable inference

from what you have heard.

You are the sole judges of the credibility of the witnesses and you have to decide how much weight to give their testimony. The assumption that a witness will speak the truth may be dispelled by the appearance and the conduct of the witness or by the manner in which he or she testified, by the character of the testimony or by evidence contrary to what was said, and you have to weigh all of the circumstances to decide whether a witness is worthy of belief in whole or in part. Consider the witness' intelligence, motive, his state of mind, his relationship to the prosecutor or the defense in the case, and the demeanor of the witness while he or she was on the witness stand.

Consider the way the witness might be affected by the verdict in the case or contradicted by other evidence in the case.

If you think a witness has wilfully sworn falsely you can ignore completely that witness' testimony, you don't have to, you can accept part of it. You are not to give any greater weight or credibility to the testimony of a witness who testified solely because of the fact that he was an

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agent of the Government or a police officer or another official. You will weigh each witness' testimony based upon your experience and what you have heard and what you know from this case.

If you believe the testimony of an accomplice in imputing guilt to a defendant you may convict the defendant upon such testimony together with the other evidence in the case.

The testimony of an accomplice must be carefully scrutinized because of his bad character as revealed by his admitted criminal acts which makes him less reliable as a witness. And that is true of female witnesses and male witnesses because he or she may have testified as they did to court favor with the Government.

You may, however, rely upon such testimony of a conspirator as you believe.

Mr. Holt, as the defendant, was a competent witness. He voluntarily took the stand although he could not be compelled to do so. So his testimony should not be disbelieved merely because he is a defendant and you may rely upon his testimony or such of it as you believe just as you may rely upon such of a co-conspirator's testimony as you believe or

alleged co-conspirator's testimony, I should say.

In weighing the testimony you may consider the fact that the defendant has a vital interest in the outcome of the trial and you may consider his explanations and prior statements in assessing his credibility.

The defendant, as you recall, called a number of character witnesses to the stand to testify to his good character and reputation.

You may give as much weight to the evidence of good character or reputation as you deem appropriate, bearing in mind that the evidence of good character when considered with all the other evidence in the case may alone be sufficient to create a reasonable doubt of guilt. You have to consider all the evidence in the case.

You also heard from a medical expert. Other experts have contrary views as revealed by the testimony. You should evaluate the credibility of this expert the way you would any other witness.

Your recollection of the evidence governs.

If you wish, you may call for any of the exhibits or all of the exhibits by sending in a note or asking to have any or all the testimony read. Try to be

specific if you want testimony so we don't have to sit here and read a lot of material that you really don't want.

Now to sum up, then, there are four counts for you to consider. First, the conspiracy count.

Second, the receiving or concealment count.

Third, the possession count with intent to distribute; and

Fourth, the distribution count.

If you want any more of the charge read after you deliberate you can ask for that and I will be glad to re-read part of it to you or try to explain it.

If you have any difficulty, send in a note so we can go over it in advance.

Each of you is entitled to your own opinion, but you should exchange views with your fellow jurors and listen carefully to each count.

Your decision must be on your own. Any verdict must be unanimous as to the count.

Your oath sums up your duty, that is, "Without fear or favor to any person, you will well and truly try the issues before these parties according to the evidence given to you in court and the laws of the United States."

You can wait and give me a verdict on all four counts or you can come in count by count, whatever you prefer.

Is there any objection to excusing the alternates?

MR. KAPLAN: No, your Honor.

MR. PASCARELLA: No, your Honor.

THE COURT: The four alternates are excused.

Thank you very much. Don't discuss this case among yourselves or with anybody else until the verdict is in.

Will tee attorneys come up to the side bar, please?

(Whereupon, the following discussion took place at the side bar out of the hearing of the jury.)

THE COURT: Any objection?

MR. PASCARELLA: Yes.

THE COURT: You have an exception.

MR. PASCARELLA: I reiterate those made earlier when we were discussing the charge and your Honor, on page 7 of his charge in speaking about a single act in the third paragraph, "A single act may be enough to draw a defendant within the ambit of the conspiracy provided you are convinced," and in your

Honor's charge you left out beyond a reasonable doubt.
You did not say that in the charge.

(The following was said in open court.)

THE COURT: Each and every element has to be proven beyond a reasonable doubt.

(The following discussion took place at the side bar.)

MR. PASCARELLA: Just one point, on page 9, you use the word "obviously." I thought your Honor was going to omit it.

THE COURT: What page?

MR. PASCARELLA: Page 9.

(The following was said in open court.)

THE COURT: If I said anything was obvious, I didn't mean it was obvious. You are going to have to decide that. I may have slipped. I didn't mean to suggest that I have any view on the evidence. That is for you to decide.

(The following took place at the side bar.)

MR. PASCARELLA: That's basically it, your Honor.

THE COURT: Is there anything else?

MR. PASCARELLA: No, your Honor.

MR. KAPLAN: No exceptions.

(The following took place in open court.)

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THE COURT: Where are the marshals?

(Whereupon, the Clerk of the Court swore in ... the marshals.)

THE COURT: Did you hear all of that? It was mumbled. Say it clearly so the jury can hear it, please.

THE CLERK: From the beginning?

THE COURT: Right, from the beginning so they can understand what the marshals are going to do.

(Whereupon, the Clerk of the Court swore the marshals.)

THE COURT: You understand, you just confer with each other. If you want to talk to anybody else you send a note out through the marshal to me. Retire and consider your verdict. Give the Foreman the paper and pencils, we'll send it in to you.

(Whereupon, the jury was excused at 4:22 p.m. to commence deliberations.)

THE COURT: Gentlemen, would you lay out on the side all of the exhibits in the case so there is no problem?

MR. KAPLAN: Including all the copies of the grand jury testimony that we previously had given to them?

THE COURT: Yes.

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(Time noted 3:30 p.m.)

(The Jury entered the Jury box.)

THE COURT: I want order in the courtroom.

If any of you cannot control yourselves please leave now.

I understand, madam, that you have reached a verdict.

JUROR NO. 1: We have, your Honor.

THE COURT: Will the Clerk take the verdict?

THE CLERK: Yes, your Honor.

How do you find the defendant, Robert Holt, as to Count 1, guilty or not guilty?

JUROR NO. 1: We find him innocent on the first count and guilty on the three other counts.

THE CLERK: How do you find the defendant, Robert Holt, as to Count 2, guilty or not guilty?

JUROR NO. 1: Guilty.

THE CLERK: How do you find the defendant,

Robert Holt, as to Count 3, guilty or not guilty?

JUROR NO. 1: Guilty.

THE CLERK: How do you find the defendant,
Robert Holt, as to Count 4, guilty or not guilty?

JUROR NO. 1: Guilty.

THE CLERK: Guilty?

JUROR NO. 1: Yes.

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THE CLERK: Ladies and gentlemen of the Jury, you say you find the defendant, Robert Holt, guilty as to Count 1 and guilty as to Count 2, 3 and 4 and so say you all.

THE COURT: Poll the Jury, please.

THE CLERK: Ladies and gentlemen, as the Court has received your verdict you say you find the defendant not guilty as to Count 1 and guilty as to Count 2, 3 and 4.

Juror No. 1, is that your verdict?

JUROR NO. 1: Yes.

THE CLERK: Juror No. 2, is that your verdict?

JUROR NO. 2: Yes.

THE CLERK: Juror No. 3, is that your verdict?

JUROR NO. 3: Yes.

THE CLERK: Juror No. 4, is that your verdict?

JUROR NO. 4: Yes.

THE CLERK: Juror No. 5, is that your verdict?

JUROR NO. 5: Yes.

THE CLERK: Juror No. 6, is that your verdict?

JUROR NO. 6: Yes.

THE CLERK: Juror No. 7, is that your verdict?

JUROR NO. 7: Yes.

THE CLERK: Juror No. 8, is that your verdict?

JUROR NO. 8: Yes.

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3	1	THE CLERK: Juror No. 9, is that your verdict
	2	JUROR NO. 9: Yes.
	3	THE CLERK: Juror No. 10, is that your verdict
	4	JUROR NO. 10: Yes.
	5	THE CLERK: Juror No. 11, is that your verdict
	6	JUROR NO. 11: Yes.
	7	THE CLERK: Juror No. 12, is that your verdict
	8	JURCR NO. 12: Yes.
	9	THE COURT: Thank you, ladies and gentlemen.
	10	Is there any reason Counsel know of why this
	11	Jury should not now be discharged?
	12	MR. KAPLAN: I know of no reason, your Honor.
	13	MR. PASCARELLA: No, your Honor.
	14	THE COURT: Ladies and gentlemen, thank you
	15	very much for your assistance.
	16	You may or may not discuss this case with
	17	anybody as you choose. You need not answer anybody's
	18	questions or talk about the case. But, if you wish,
1	19	you may do so. Is that clear?
	20	Thank you. Go downstairs to the central
	21	Jury room now.
	22	(Jury discharged at 3:35 p.m.)
	23	THE COURT: Any motions?
4	24	MR. PASCARELLA: Yes, your Honor.
	25	At this time I would move that the Court set

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could have done that long ago too.

I grew up in an area where people in my area when they become a cop you become something nobody in the neighborhood wants, you become something different.

That is all I have to say.

THE COURT: Does the government have anything to add?

MR. KAPLAN: The government has no comment.

THE COURT: Well, this is a very strange case and defendant does have a good record in the army and police force. There are strange aspects to the case.

He was convicted primarily on the admissions he made and the wiretap and the direct evidence.

I do not know whether you are guilty or not but that is not my decision. The jury decides that. You are a professional. You know that in most instances the jury when they come with a guilty verdict, given the presumption of innocence, is usually right. Sometimes they make a mistake, we know that. If they made a mistake in your case it is a grave injustice but

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2	UNITED STATES DISTRICT COURT
3	EASTERN DISTRICT OF NEW YORK
4	x
5	UNITED STATES OF AMERICA, :
6	-against-
7	ROBERT HOLT, : 75-CR-393
8	Defendant. :
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12	United States Courthouse Brooklyn, New York
13	October 23rd, 1975 10:00 o'clock a.m.
14	13130 O CIGER A.M.
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16	Before:
17	HONORABLE JACK WEINSTEIN, U.S.D.J.
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24 11	CURT DOM GTT TERROR

SHELDON SILVERMAN ACTING OFFICIAL COURT REPORTER

DAVID G. TRAGER, ESQ., United States Attorney for the Eastern District of New York

BY: STANLEY MARCUS, ESQ., Assistant United States Attorney

JAMES A. PASCARELLA, ESQ., Attorney for the Defendant

1	Blackshear - direct 4
2	Q How long have you been at that job?
3	A I've been at that job for approximately three
4	years.
5	Q Were you employed in that capacity in December
6	of 1974?
7	A Yes, I was.
8	Q I ask you now do you know Robert Holt?
9	A Yes, I do.
10	Q How long have you known him?
11	A I've known him for approximately two years
12	well, I've known him for approximately eight years, but I
13	was his supervisor for two of these years.
14	Q During what period of time?
15	A The latter part of '73 to the latter part of
16	up until the time that he was suspended.
17	Q Did that include December, 1974?
18	A Yes, it did.
19	Q Let me ask you if Police Officer Holt or any
20	other police officer under your command in your present
21	assignment was requested to leave his duty during regular
22	duty hours, did youhave to know about it?
23	A Yes, I do.
24	Q Do you recall whether or not there were any
25	requests for Police Officer Holt to leave his assigned dutie

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in the month of December, in the year 1974?

Yes.

Would you explain the nature of the request?

We had a telephone message through our Administration Office, Office of Programs and Policies, and the message stated that Officer Holt was to report out to see an Assistant Attorney Kaplan on December 17, 1974.

That was at the United States Attorney's Office for the Eastern District of New York?

> Yes. A

Do you know approximately when this was that he was requested?

> December 17th. A

> > THE COURT: I couldn't hear you, I'm sorry.

THE WITNESS: December 17th. I'm sorry.

To your knowledge, did Police Officer Holt go to the Eastern District of New York on December 17th, 1974?

Yes, to my knowledge, he did.

Did you have occasion to speak to Police Officer Holt after his return from the Eastern District of New York?

> Yes, I did. A

When did you speak with him subsequent to Q that?

A It was either the day after or the following day. It was no longer than two days.

Q Do you recall what was said when you spoke to him?

A Yes. I asked him why he was -- why he was asked to go out to see this attorney. He said he was called in and that there was a possibility of him being indicted and that he said that he had talked to the attorney and the attorney said he could possibly plead to a lesser plea.

MR. PASCARELLA: No further questions.

MR. MARCUS: Just a few questions, your Honor.

CROSS-EXAMINATION

BY MR. MARCUS:

Q You testified that Holt came to you on

December 18th or 19th and at that time indicated to you that
he could possibly be indicted and that he could possibly
take a plea to an offense.

Did he tell you anything else at that point?

- A No, I didn't really get into any details.
- Q Did he tell you what charge he was offered to plead guilty had been made to?
 - A He may have but I don't remember.
 - You have no recollection?
 - A I have no recollection.

Blackshear - cross

Q Did he ever have occasion to tell you he accepted a plea of guilty at that time?

A No, he didn't.

Did he ever have occastion to tell you that the prosecutor had informed him that he wasn't believed — that he was involved in serious charges and that in fact he had been subpoensed to testify before the Grand Jury on December 27th, 1974?

A No.

MR. MARCUS: No further questions.

MR. PASCARELLA: Just one.

REDIRECT EXAMINATION

BY MR. PASCARELLA:

Q Sergeant Blackshear, do you recall the words or any of the words that the Police Officer Hold used when he spoke to you upon his return from the U.S. Attorney's Office?

A Not the exact words.

Q To the best of your recollection, can you repeat --

A Just a general conversation. I was curious why he had been called out to see the attorney and he said that he had been offered a plea.

He may have mentioned the specific charge

1	Blackshear - redirect 8
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5	A No he may have, but again, I don't remember.
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9	MR. PASCARELLA: I have no further questions,
10	your Honor.
11	THE COURT: Any?
12	MR. MARCUS: No further questions.
13	THE COURT: Thank you very much, Sergeant.
14	(Witness excused.)
15	THE COURT: I want to hear whether defense
16	counsel has any further evidence or witnesses to
17	produce?
18	MR. PASCARELLA: No, this would include any
19	evidence that we can seek to introduce I'll
20	restate what I said.
21	This is all the evidence we are seeking to
22	introduce with regard to our 11(e)6 position.

MR. PASCARELLA: That's correct.

THE COURT: You rest?

THE COURT: Does the Government have any

	evidence.
2	MR. MARCUS: At this point the Government
3	would like to put on the stand Mr. Kenneth Kaplan.
4	KENNETH KAPLAN , called
5	as a witness herein, having been first duly sworn
6	by the Clerk of the Court, was examined and testified
7	as follows:
8	Q Would you tell us your occupation?
9	A Assistant United States Attorney for the
10	Eastern District of New York.
11	Q How long have you been so employed?
12	A Almost four years since January of 1972.
13	Q Did you have occasion in the course of your
14	official duties as Assistant United States Attorney to be
15	assigned to investigate police corruption matters?
16	A Yes, I did.
17	Q How long have you been investigating police
18	corruption matters?
19	A Since approximately March of 1974.
20	Q Did you have occasion to investigate a
21	police officer by the name of Robert Holt?
22	A Yes, I did.
23	Q Did there come a time in the course of the
24	threattentian of the Defendant Robert Holt when you asked

him to come down to your office?

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When did that happen?

That's correct.

He was called down in December of 1974, sometime prior to December 17th, 1974.

> Q When did he actually come to the office?

December 17th.

Who was present at that meeting?

DEA Agents Moser, Martin and McGuire, Assistant A United States Attorney Appleby and myself.

Who spoke at that meeting?

I presided at the meeting, although some of the agents and Mr. Appleby had sti ments that were made during the course of the meeting.

Would you relate the substance of what you said to Mr. Holt and what Mr. Holt said to you at that meeting?

Mr. Holt came in. He was advised that he was a subject of investigation; that we had accumulated certain evidence concerning his activities in the Police Department which would warrant an indictment against him.

During the course of the conversation we advised him that the charges that might bebrought against him were rather serious, that they involved violations of the narcotics laws and his exposure to maximum terms of

imprisonment could be many, many years.

I then advised him there were alternatives
that he could pursue if he wanted to cooperate. He would
have the opportunity, for example, on one hand to be indicted
and fight the case fully and suffer the consequences or
he could cooperate with the Government and perhaps be
accorded the opportunity of receiving a lesser plea, one
count instead of many counts of an indictment and I advised
him at that time that other police officers who had cooperated with the U. S. Attorney's Office, both in the Eastern
and Southern Districts of New York, had received lesser
pleas and on one occasion, for example, a Patrolman
Martinez, had received a lesser plea and had to go to jail
for six months and he might have gone to jail for many years
if he had not cooperated.

I advised him of his alternatives and I then asked him what his position was with respect to cooperating with the Government. He indicated at that time that he was a police officer and he surely wanted to cooperate with the Government.

we then began to ask him questions. He was very evasive and non-commital relative to his activities regarding corrupt matters. We said to him that as far as cooperation was concerned, it was not as a police officer,

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but one who was going to make a full disclosure of his activities.

At that time he said he had nothing to disclose because he had not done anything wrong. I then advised Agent Moser who was sitting there to give him his rights.

Agent Moser gave him his full Constitutional warnings.

At that time, Mr. Holt was fully interrogated and he made certain admissions. He was subsequently called back on December 27th --

Q Before you get to that, Mr. Kaplan, was he given a subpoena to appear at the December 27th meeting, before the Grand Jury on December 27th?

A That's correct.

He was also advised many times by myself and the other people inthe room that he was not believed; that we did not believe he was cooperating, that we had certain information which disclosed his activities and we just were not ready to accept his explanations.

He admitted knowing to certain people but certainly having no illegal dealings with them.

We told him that we not happy with his ccoperation and he ought to think it over.

We brought him back on the 27th.

Did you have occasion to meet with him again

1			Kaplan - direct	13
on	December	27th?		

- A Yes, we did.
- Q Who was present at that meeting?

A The same people who were present at the first meeting. He was questioned extensively again. We were again unimpressed with his answers and as a result he was brought before the Grand Jury.

Q Mr. Kaplan, just two more brief questions:

During the course of both of these meetings;
that is, on December 17th and again on December 27th, did you or anybody else ever offer a plea of guilty to Mr. Holt?

A Absolutely not. We merely advised him of his alternatives that he could plead guilty as to a specific offer of a plea of guilty.

He was given no specific offer. Obviously he could plead guilty, but certainly he was not advised as to what he could plead guilty to.

Q No offer to plead guilty to any offense was ever made to him; is that correct?

A That's correct.

Q During both of these meetings, did Mr. Holt ever agree to plead guilty to any offense?

A Absolutely not.

MR. MARCUS: No further questions.

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CROSS-EXAMINATION

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BY MR. PASCARELLA:

Q Mr. Kaplan, you had indicated you discussed with Mr. Holt possibilities of cooperating or not cooperating when he was at your office on December 17th, 1974; is that correct?

A That's correct.

Q In explaining these possibilities you indicated he could go all the way to trial or he could cooperate and what further did you say at that point?

A I indicated to him that he had the alternatives of going to trial as he did and fighting the case or on the other hand, cooperating with the Government and receiving any benefits that one might normally receive, but by telling him what cooperation meant, in defining cooperation to him, we said, quote, that you have to make a full disclosure of your illegal activities to our satisfaction, unquote.

In other words, "Once we can evaluate your credibility on the basis of the disclosures you made, then we can evaluate the nature of the plea that might be offered."

Q It was all dependent upon the nature and quality of his cooperation what you would offer; is that

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your testimony?

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Well, let me say this, it was based upon --

Is that your testimony? Q

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Rephrase the question.

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What he would be offered was all based then upon the nature and quality of his cooperation; is that

Well, he'd be offered a plea of guilty based

I gave him a number of examples. I used that

Are you also saying you indicated to him

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your testimony?

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upon the nature of the cooperation.

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another Police Officer, Martinez, cooperated and he was

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given a lesser count to sentence, six months?

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example because Mr. Holt mentioned it at the trial,

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improperly, though.

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Didn't you indicate to him that he could plead

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to a tax count?

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No. I mentioned a tax count in connection A

with other police officers who had plead guilty to tax

counts, who had fully cooperated with the Government, who

had been dismissed from the Police Department, who had

made full disclosures, had testified at trials, had testified

in Grand Juries, had incriminated themselves and had done

all these activities, so I was telling him what it meant to

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cooperate.

Q Did you indicate to him that if he cooperated an information would be filed charging him with a tax count?

- A Absolutely not.
- Q You never did that?
- A Absolutely not.
- Q Was it your testimony under the direct examination that you never offered a plea to the defendant?

A It was never offered -- he was offered the opportunity to plead.

- Q No, did you ever at any time offer --
- A A specific plea?
- Q Yes.

A No. He was never offered a specific plea, except, let me say this: At this time we are talking — there was a time when he was offered, with his attorney, a plea to the indictment or a plea with Mr. Bishop, conceivably, but not during the time we are talking about in December.

- Q He was offered a plea to the indictment?
- A In the December 17th -- are we talking about that?
 - Q No.

Was he ever offered a plea, ever, during the

whole procedure we have gone through since the inception of the investigation until the time of trial, did you ever offer a specific plea to Mr. Holt?

A I think subsequently he may have been offered a plea, not to him personally, through --

Q Through --

A If an attorney was present.

Q Do you know specifically if it was ever made, not it may have or if an attorney was present?

A I know for a fact it was never made when no attorney was present.

Q Did you ever specifically offer any plea to Mr. Holt?

A Personally?

Q Yes.

A Without an attorney?

Q Did you ever, whether his attorney was there or whether no attorney was there?

THE COURT: No, don't answer that.

We are going to get a confused record.

Be specific as to time.

Q Did you at any time ever offer a plea to Mr. Holt himself?

THE COURT: Without an attorney.

Without an attorney present? Q

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with --

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No.

Did you at any time ever offer a plea to Mr. Holt when he had an attorney present?

I believe he may have been offered the opportunity to plead, again.

It's the same --

With an attorney present.

No. it's different. I had conversations

Let me ask you the questions, Mr. Kaplan.

I'm just asking you whether you might -- but to your recollection, did you ever offer a specific plea to Mr. Holt when an attorney was present?

I do have a recollection that when he was represented by Mr. Bishop, Mr. Bishop and Mr. Holt were in my office and we discussed the possibility of a plea at that time, yes.

Did you ever offer him a plea when he had an Q attorney present?

My understanding was that he was told at that time that what would happen is that he would be dismissed from the Police Department and he would be expected to plead to a major narcotics felony count.

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THE COURT: Excuse me. I want to get the record clear. This was after indictment when Mr. Bishop --

THE WITNESS: Just prior to indictment, just prior to indictment. I believe it was within a month of indictment.

THE COURT: Mr. Bishop --

THE WITNESS: Was present in the room, your Honor.

THE COURT: All right.

BY MR. PASCARELLA:

So then it's your testimony that prior to indictment in the presence of Mr. Bishop, you offered a plea to Mr. Holt and the plea was to a major narcotics count; is that correct?

A I told Mr. Bishop this is what we expected.

If you want to consider it an offer, that was what the conversation was.

Q Let me ask you this: In your mind, did you ever offer a specific plea?

A I think that would be a fair statement, in my mind I would say that, yes, we expected that Mr. Holt would have to plead guilty to a major narcotics felony count.

Q What did you consider to be a major narcotics felony count?

A Under the present law, a plea to a possesion or a plea to a sale of narcotics under 841, Title 21, which would be a zero to fifteen count.

It's your testimony that you had never offered him a plea to a tax count?

A Absolutely not. This is a narcotics case.

I had no authority to offer a tax count.

THE COURT: Don't --

THE WITNESS: I'm sorry, your Honor.

THE COURT: Don't go on. You always tell witnesses on cross-examination, "Just answer briefly."

Try to do what you tell witnesses to do.

Q Is it your position that in the prosecution of narcotics cases the U.S. Attorney's policy is not to and was not to offer tax counts when 173 and 174 were viable laws, Mr. Kaplan?

MR. MARCUS: I object to that question, your Honor. I don't see the relevancy nor do I think he can testify --

THE COURT: Sustained. Let's get the factual predicate.

MR. PASCARELLA: I think, your Honor, it's an

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important point. Mr. Kaplan is trying to say
it would have been impossible for him to offer
because it wasn't done, knowing full well I've been
a prosecutor in that office for five years and have
done it many times myself.

THE COURT: It's not impossible. It could have been done.

THE WITNESS: Not under these circumstances.

MR. MARCUS: Mr. Kaplan, just answer the

questions, please.

THE COURT: Anything further?

CROSS-EXAMINATION

BY MR. PASCARELLA: (Cont.)

Q You indicated during the December 17th meeting after some time when you advised Mr. Holt that he wasn't cooperating, he did make some admissions; is that correct?

A That's correct.

Q Some of those admissions you brought out in court through Agent McGuire, didn't you?

A That's correct.

Q In court, I mean during the trial.

A Yes.

MR. PASCARELLA: No further questions.

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REDIRECT EXAMINATION

BY MR. MARCUS:

Mr. Kaplan, this inquiry has initially focused on the dates of December 17th and December 27th when you met with Mr. Holt in your office.

Mr. Holt at that point was not represented by counsel. At those meetings did you ever offer any plea to Mr. Holt?

Absolutely not.

MR. MARCUS: No further questions.

THE COURT: Thank you, sir.

Any further witnesses for the Government?

MR. MARCUS: No.

THE COURT: Both sides rest.

MR. PASCARELLA: Yes.

MR. MARCUS: Yes.

THE COURT: I suggest, Mr. Pascarella, if I may specifically, that you make your motion broader than merely 11(e)6 so that the Appellate Court would have the full benefit of your brief; that is, if you may wish to make it not only on the specific rule 11(e)6, but that you make it on the grounds of self-incrimination and any other grounds, constitutional or otherwise that you can think of so we will

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have the full matter before us and we will not later have to consider 2255 motions.

Do you so move?

MR. PASCARELLA: Yes.

THE COURT: Phrase it yourself, please.

MR. PASCARELLA: The motion that I make is a motion directed to the defendant's rights --

THE COURT: No, you are making a motion to what, set aside the verdict?

MR. PASCARELLA: Firstly, I thought you wanted me to expound on this motion.

THE COURT: Whatever your motion is, make it specifically so we have a clear and comprehensive motion on the record.

MR. PASCARELLA: The original motion was basically designed to reopen the suppression hearing, which I presume is what we had the hearing from.

THE COURT: Yes, that motion is granted to reopen the suppression hearing.

MR. PASCARELLA: So that I take it, your Honor must then reconsider his decision on the suppression matter.

Directed in that regard, the defendant makes a motion to set aside the verdict of the jury based

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on all the grounds previously enumerated and as expounded by the testimony today, such grounds to include Rule 11(e)6, grounds involving offer of a plea and the inadmissibility of certain specific evidence, to wit, admissions allegedly made by the defendant, Grand Jury testimony by the defendant and subsequently tapes of a wiretap conversation whose ground was provided by the admissions and the Grand Jury testimony, whose grounds for admissibility

The motion encompasses the further grounds
that the Fourth and Fifth and Sixth Amendment rights
of the defendant were violated, that is his right
to counsel, his right not to incriminate himself
but to stand mute.

THE COURT: Illegal search.

MR. PASCARELLA: And illegal search and seizure.

THE COURT: The motions are in all respects denied. The motion to suppress is denied. The motion to set aside the verdict is denied.

This is a hypothetical denial because the Court does not now have the power to hear this case in view of the fact that it is pending in the Court of Appeals.

Under the procedure as I understand it, the defendant and the Government will join in the

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motion to remand the case from the Court of Appeals to take further evidence or this issue.

At that time, should the remand be granted, the Government will submit an order denying a motion to suppress and the motion for a new trial and a further appeal will then be taken from that denial and from the sentence.

I believe that's the proper procedure because I don't believe I have jurisdiction.

MR. PASCARELLA: Might we go off the record?
THE COURT: No.

MR. PASCARELLA: Let me just indicate that
I thought it might be the proper procedure when I
spoke with your Honor last, at the sentencing, but
before going ahead with that and I believe what
Mr. Kaplan and I had spoken about at subsequent
times in Mr. Kaplan's office, I called the Second
Circuit Office and they advised that I speak with
Mr. Aponte, who is the Clerk in the Southern District
for appeals to the Second Circuit, and he advised
me that the District Court still retains jurisdiction
over a matter even when a notice of appeal is filed
and indeed that's why I went ahead and filed a notice
of appeal.

The District Court still has jurisdiction even

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thought it's filed until the record and transcript have been filed and docketed with the Court of Appeals.

THE COURT: It's a matter of indifference what the procedure is. The Government may, if it wishes, submit an order at any time and I'll sign it.

MR.PASCARELLA: It's just a matter of procedure, your Honor.

MR. MARCUS: I wanted to point out --

MR. PASCARELLA: I'm confused as to what should be done in light of your Honor's statement.

THE COURT: I don't know. I'm not an expert on Appellate procedure any more.

I don't think I can be, to be honest, admitted to the Second Circuit in view of the fact I haven't taken the necessary courses in law school so I'll have to leave it to you and whatever you want to do, procedurally, I will follow.

MR. MARCUS: It's the Government's position also, the District Court still retains jurisdiction on this matter until the record actually was docketed in the Court of Appeals and accordingly, the Government intends to submit an order denying the motion to suppress for a new trial at this point.

THE COURT: I'll be happy to sign it. I don't

want the thing bouncing back and forth if we can avoid it.

MR. MARCUS: The Government's position, this would be the easiest way to obviate sending it to the District Court and up and down again.

THE COURT: We should avoid that kind of going up and down unnecessarily.

Thank you, gentlemen.

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WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
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 $\underline{\mathtt{E}} \ \underline{\mathtt{X}} \ \underline{\mathtt{H}} \ \underline{\mathtt{I}} \ \underline{\mathtt{B}} \ \underline{\mathtt{I}} \ \underline{\mathtt{T}} \ \underline{\mathtt{S}}$

None.

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OD:KJK:pal

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

ORDER

- against -

75 CR 393

ROBERT HOLT,

Defendant.

Upon the motion of James Pascarella, Esq., attorney for the deferment ROBERT HOLT in the above-captioned case, for the suppression of certain evidence pursuant to the Fourth, Fifth, and Sixth Amendments to the United States Constitution, and Rule 11(e)(6) of the Federal Rules of Criminal Procedure, and for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, and

Upon all evidence adduced at the suppression hearing, trial and at a hearing held before this Court on the 23rd day of October, 1975, it is hereby family that no plan mentations to place affect on the presence of these armed size by the first made or defends and the all the state of the second size of the second siz

ORDERED that the defendant's motion, pursuant to the Fourth, Fifth, and Sixth Amendments to the United States Constitution, and Rule 11(e)(6) of the Federal Rules of Criminal Procedure for suppression of any and all statements made by him at the December 17 and December 27 conferences in the United States Attorney's Office, and of his testimony before a Federal Grand Jury of the Eastern District of New York on December 27, 1974, and of a tape-recorded conversation between the defendant and one Ernest Solomon on October 1st and 4th, 1971, is hereby denied in all respects; and it is

ORDERED that the defendant's motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure

pursuant to Rule 33 of the Federal Rules of Criminal Procedure; is hereby denied in all respects.

Dated: Brooklyn, New York

October 24 1975.

DATED LEWIS OFGEL

CLERK

DEPUTY CLERK

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John 19 Wants
UNITED STATES DISTRICT JUDGE

SUPREME COURT, STATE OF NEW YORK COUNTY OF KINGS

IN THE MATTER OF THE APPLICATION

-OF-

EUGENE GOLD, DISTRICT ATTORNEY OF THE COUNTY OF KINGS, FOR AN EAVESDROPPING WARRANT PERMITTING THE INTERCEPTION OF COMMUNICATIONS BEING TRANSMITTED OVER TELEPHONE INSTRUMENT

853-8360

STATE OF NEW YORK)
COUNTY OF KINGS) ss:

EUGENE GOLD, being duly sworn, deposes and says,

I am the District Attorney of the County of Kings, State of New York.

This affidavit is submitted in support of an application for an Eavesdropping Warrant authorizing the interception of telephone communications.

I make this application upon information and belief. The sources of deponent's information and the grounds of his belief is the affidavit sworn to on the 19th day of September, 1971 by DETECTIVE EDWARD CODELIA, Shield Number 615, a New York City Police Officer with the rank of Detective, assigned to and working out of the Narcotics Bureau Special Investigation Unit. I incorporate

all the facts set forth in the affidavit of Detective Edward.

Codelia as though the same were fully set forth herein upon information and belief.

That by reason of the facts set forth in this application I have probable cause to believe that the crime of Violation of Article 220; Dangerous Drug Offenses, of the Penal Law of the State of New York, has been, is being, or is about to be committed.

There is probable cause to believe that the interception of telephone communications of Ernest Solomon, a/k/a

"Ernie", will furnish evidence of the commission of the crime of

Violation of Article 220; Dangerous Drug Offenses, of the Penal

Law of the State of New York, and he maintains and makes use of

a telephone instrument bearing the number 853-8360, which is

located at 91 Ocean Parkway, Borough of Brooklyn, City of New York,

and is listed in the records of the New York Telephone Company in

the name of Pricilla Pankey.

The conversations to be intercepted, if an eavesdropping warrant is issued herein, will pertain to the commission
of crimes and be relevant to a prosecution for the crime of Violation of Article 220; Dangerous Drug Offenses, of the Penal Law of
the State of New York.

The progress of the investigation with respect to the crimes set forth herein shows that the conversations sought to

be intercepted are not privileged.

Normal investigative procedures have been tried by members of the New York City Police Department; as shown in the affidavit of Detective Edward Codelia, Shield Number 615, hereto annexed, and have failed, and reasonably appear to be unlikely to succeed. The information sought by any further investigation, if tried, may become too dangerous or result in the premature disclosure of the nature of the investigation, causing the collapse of an otherwise successful disclosure of evidence of the crimes under investigation.

It is requested that if an eavesdropping warrant be issued upon this application, that it be made effective for a period of 30 days and should designate that the conversations be intercepted for 24 hours on each of said days. The commission of the crimes set forth herein is a continuing one and will not automatically terminate by the interception of a single particularly described conversation. The facts show that Ernest Solomon, a/k/a "Ernie" is engaged in violation of the Penal Law with respect to the crimes aforementioned as a means of livelihood and will use the telephone instrument herein described to carry on the criminal enterprise each day at all hours of the day and night, requiring constant and uninterrupted surveillance of messages transmitted over the said telephone instrument, deponent having reasonable cause to believe that additional information of the same type will occur

repeatedly.

No previous application has been made for the relie herein sought to any other Court of Justice.

WHEREFORE deponent requests that an eavesdropping warrant be issued herein, permitting the interception and the use of mechanical and electronic devices for the overhearing and recording of conversations transmitted over the telephone instrument bearing the number 853-8360, which is located at the premises 91 Ocean Parkway, County of Kings, City of New York, which is listed in the records of the New York Telephone Company in the name of Ernest Solomon, a/k/a "Ernie", said warrant to become effective on the 25th day of September, 1971, and shall not automatically terminate when the described communication has been first obtained but shall continue and terminate on the 19th day of October, 1971. The said interceptions are to be made 24 hours for each of said days.

It is further requested that any eavesdropping warrant issued herein provide that if it becomes necessary, secret entry may be made upon the premises described herein to install any pertinent intercepting devices.

EUGENE GOLD

Sworn to before me this 19th day of September, 1971.

/s/ Vincent P. Fay, Jr.
Notary Public #1174925
Kings County
Expires 3/30/73

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SUFREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

IN THE MATTER OF THE APPLICATION

- of -

EUGENE GOLD, DISTRICT ATTORNEY, OF THE COUNTY OF KINGS, FOR AN EAVESDROPPING WARRANT PERMITTING THE INTERCEPTION OF COMMUNICATIONS TRANSMITTED OVER TELEPHONE INSTRUMENT

853- 50

CITY OF NEW YORK)
COUNTY OF KINGS

s:

EDWARD CODELIA, Shield Number 615, being duly sworn, deposes and says:

- l. I am a police officer on the force of the New York City, police Department with the position and rank of Detective, assigned to and working out of the Special investigation Unit, Marcotics Division of the City of New York.
- 2. Deponent, together with other members of the New York.

 City Police Department, have been engaged in the investigation of the commission of the crime of Violation of Article 220; Dangerous Drug Offenses, of the Benal Law of the State of New York, that:
- As a result of information received from a confidential informant, which concerns violations of Article 220;

 Dangerous Drug Offenses, of the Penal Law of the State of New York, whose information has been reliable in the past, and who has been registered as an informant in the Narcotics Division of the Police Department of the City of New York. As a result of information which this informant furnished in the past, the following arrests have been made. The arrest of Elieser Polanco, B#7995h6, and

Fred Szafran, B#799542, on April 17, 1970, for possession of 235 pounds of marijuana and 6 onuces of cocaine; Polanco and Szafran pleaded guilty to Criminal possession of a Dangerous Drug in the Third Degree, a Class "C" Felony, in the Supreme Court of the State of New York, Kings County; the arrest of Anthony Santana, B#351533, on August 16, 1970, for the sale and possession of 6 ounces of occaine; the arrest of Robert Fernandez, B#631384. for possession of 6 ounces of occaine on August 16, 1970. Santana pleaded guilty to Criminal Possession of a Dangerous Drug in the Fourth Degree, a Class "D" Felony, in the Supreme Court of the State of New York, Bronx County; Fernandez pleaded guilty to Criminal Possession of a Dangerous Drug in the Sixth Degree, in th Supreme Court of the Satata of new York, Bronz County. Information supplied by this confidential informant has always proved reliable and did lead to the successful arrests and convictions in the heretofore mentioned cases.

3. As a result of a conversation had on or about August 9, 1971, at approximately 8:30 PM at Flatbush Avenue and Church Avenue in the Borougn of Brooklyn, County of Kings, betuddn your deponent and the confidential informant, the said informant described the subject of this order to be one Ernest Solomon, a/k/a "Ernie", living at 91 Ocean Parkway, apartment 3A. 91 Ocean Parkway, County of Kings, is a six story red brick building, multiple dwelling, with a step down entrance and with a garage on the inside right side of the building. Apartment 3A is located on the third floor and is listed in the lobby on the door bell and mail boxes to one E. Solomon. The confidential informant described the subject of this order as being a male, black,

approximately 38 years of age, approximately 5 foot 10 inches, 175 pounds, medium build, with light brown skin, with a moustache and clean and smooth face.

4. The confidential informant told your deponent that he had a conversation with the subject of this order on August 8, 1971, at approximately 11:00 PM within the premises 91 Ocean Parkway, apartment 3A, third floor, in the County of Kings, wherein the subject of this order, Ernie Solomon, told the confidential informant he could give the confidential informant anything the confidential informant wanted, one-eighth, or one-half of a kilo of cocaine or heroin as long as "the price was right."

In addition the subject of this order told the confidential informant he had access to Kilo seight of cocaine and heroin. The confidential informant told the subject of this order he would go back to him when he got the money togerher, and confidential informant them left the apartment of the subject of this order.

deponent that on the evening of August 26, 1971, at approximately 7:30 PM while the confidential informant was in spartment 3A at 91 Ocean Parkway in the County of Kings, the confidential informant spoke with the subject Ernest Solomon, a/k/a "Ernie", and one other known as "J. D. Nitty" concerning herion. As a result of this conversation informant was shown by both Ernest Solomom and "J. D. Nitty" a quantity of both cocaine and heroin. "J. D. Nitty" was described by the informant as being a male, black, approximately 33 years of age, approximately 5'8'' tall, approximately 150 peumos with a mustache and a modified Afro haircut.

- 6. Furthermore the confidential informant stated to you deponent that on the evening of September 3, 1971, at approximately 6:30 PM the above mentioned confidential informant againt went to apartment 3A belonging to subject Ernest Solomon, a/k/a "Ernie", located at 91 Ocean Parkway County of Kings. The above described Ernest Solomon, a/k/a "Ernie", and the above referred "J.D. Nitty" were again both present in the apartment. The confidential informant stated to your deponent that he again saw cocaine and heroin in the apartment, and that the confidential informant and Ernest Solomon, a/k/a "Ernie", and "J. D. Nitty" discussed future purchases of heroin by the confidential informant.
- 7. Furthermore, the confidential informant stated to your deponent that on September 13, 1971, at approximately 10:15 in the evening the confidential informant was again at apartment 34, 91 Ocean Parkway, in the County of Kings, that being the residence of Ernest Solomon, a/k/a "ERnie" Confidential informant reported to your deponent that he again had a conversation with your deponent in which confidential informant said that while he was at the apartment of the subject on this occasion, the subject Ernest Solomon, a/k/a "Ernie" told confidential informant that he was out of cocaine. Confidential informant told your deponent that the subject went to the telephone in subject's apartment and called a number unknown to the confidential informant, the substance that conversation being the availability of approximately one kilo of cocaine. Confidential informant was then told by the subject that after the call was completed, that he, the subject (Ernest Solomon, a/k/a "Ernie") would be expecting an order of about one kilo of "dynamite" cocaine by the middle of the week.

8. Your deponent, in the company of brother officers, did make the following observations: On August 26, 1971, at approximately 7:40 PM. Ernest Solomon, a/k/a "Ernie" was observed by your deponent to exit the premises at 91 Ocean Parkway, Borough of Brooklyn, County of Kings, Solomon then proceeded to the corner of Caton Avenue and Ocean Parkway. He was observed to be carrying a folded brown paper bag approximately ha x 6". Solomon waited on the corner for approximately two minutes, until he was approached by a mule negro approximately 27 years of age, approximately 6 feet tall, approximately 185 pounds, with a modified afro haircut and a mustache. Solomon spoke to him for several seconds and then handed him the above-described brown paper bag which he (Solomon) was carrying in his right hand. On September 3, 1971, Solomon was observed by your deponent to exit premises 91 Ocean Parkway, Borough of Brooklyn, County of Kings, and to proceed across the street to a Buick Skylark, Gold body, Brown top, license plate #KT 2267. Solomon removed keys from his pocket, opened the trunk of his car, and placed a brown part per bag, 8" x 12", inside. He then closed the trunk of the Buick Skylark; and returned to 91 Ocean Parkway. A check of the Information Unit of the Police Department of the City of New York was to the effect that this car was registered in the name of one Raymond Ellington, 82 Rockaway Parkway Borough of Brooklyn, County of Kings, and that this registration is listed for a 1970 two-door green Ford.

On September 8, 1971, at approximately 8:15 PM, your deponent observed Ernest Solomon, a/k/a "Ernie" exit 91 Ocean Parkway, Borough of Brooklyn, County of Kings, approach the above-described Buick Skylark, license plate #KT 2267, which was parked in front of 91 Ocean Parkway. At this time, Solomon engaged in conversation with the male black described on August

26, 1971 (male, negro, approximately 27 years of age, approximately 6 feet tall, approximately 185 pounds, with a modified Afro haircut and a mustache) who was driving the Buick Skylark (above). This male driver was observed to hand Solomon a roll of money in bill form. Solomon then proceeded to the driver's side of the car, entered the vehicle and drove off in the company of the male black.

THE CASE WALL

On September 9, 1971, at approximately hish5 AM, your deponent was maintaining surveillance on the corner of Midwood Street and Albany Amenue,
Borough of Brooklyn, County of Kings. Ernest Solomon, a/k/a "Ernie" was
observed to exit McGills Bar, at 567 Albany Avenue, Borough of Brooklyn,
County of Kings, wearing a very wide brimmed white hat, red shirt, and
pants. Solomon proceeded to a gold colored late model Triumph, license
plate # UQ 9079; he was observed to remove keys from his pocket, open the
trunk of his car, and to remove from the trunk a brown paper package, a pproximately 8" x 12", and to hand it to the male black described on August
26, 1971, and again on September 8, 1971 (male negro approximately 27 years
of age, approximately 6' tall, approximately 185 pounds, with a modified
Afro haircut and a mustache) who had accompanied Solomon from McGills Bar.
This male black then handed Solomon something (nature unknown) which Solomon placed in his right front rocket. Solomon then proceeded to close the
trunk of the car and both men returned to McGills Bar.

9. Furthermore, the confidential iformant, in the presence of your ponent and brother officers, placed a call from the 71st Squad Detectives located at Empire Boulevard and New York Avenue, in the Borough of Brooklyn, County of Kings, approximately two miles from 91 Ocean Parkway, County of Kings, at or about 2:45 Pm on September 15, 1971, to the telephone number 853-8360 to the subject Ernest Solomon, a/k/a "Ernie", wherein your deponent

and brother officers, with the permission of the confidential informant, heard the confidential informant and the subject Ernest Solomon, a/k/a/
"Ernie", engage in a conversation. The subject Ernest Solomon a/k/a "Ernie" stated in substance that he had a quantity of cocaine. The conversation was as follows:

<u>In</u> - Ernest Solomon a/k/a "Ernie"
Out - Confidential Informant

In: Hello.

Out: Hello, Sol, how things?

In: Very, very good. I got a good batch of high wuality "C".

Out: Good, that's just what I'm locking for.

In: Whenever you are ready to buy call me.

Out: I have someone from out of town who will be looking for 1/8.
What's the price?

In: For you, \$2,400.

Out: Will you have any horse?

In: I should have some good horse in about a week, plenty.

Out: I'll get back to you as soon as my man comes into N.Y.

Deponent further states that because of his experience as a detective in the Special Investigation Unit, Narcotics Division of the Police Department of the City of New York, he interprets the conversation to mean the following:

The "in" party, the subject of this order, has a high quality amount of cocaine in his possession and further the "in" party, the subject of this order, can supply the confidential informant with 1/8 kilo of cocaine for \$24,000.00 and further the "in" party, the subject of this order, will be expecting a large quantity of heroin in about a week. The reference to horse is street language for heroin. Further, as described herein, the in

coming party to as "in", is one Ernest Solomon, a/k/a "Ernie" who resides at 91 Ocean Parkway, apartment 3A, Borough of Brooklyn, County of Kings, and that the telephone number 853-8360 is listed in the records of the New York Telephone Company to one Pricilla Pankey, unknown to your deponent.

10. Furthermore, your deponent, in the company of brother officers, did make the following observations: On September 15, 1971, at approximately 3:15 PM, your deponent and brother officers did observe the subject of this order Ernest Solomon, a/k/a "Ernie" leave the premises at 91 Ccean Parkway in the County of Kings, and walk to the corner of Caton Avenue and Ocean Parkway in the County of Kings. There the subject of this order, Ernest Solomon, a/k/a "Ernie" met a male, white, approximately 145 pounds, approximately 23 years of age, long blonde hair, 5'8" tall. The subject of this order Ernest Solomon, a/k/a "Ernie" was observed to take out from under his coat one white package, approximately 6" x 6" in length, the contents of which were unknown to your deponent. The unknown male was observed to give Ernest Solomon a/k/a "Ernie", a sum of money in U. S. currency which Solomon put in his pocket. The unknown male was observed to put the package under his coat and walk away. The subject Ernest Solomon, a/k/a "Ernie", was then observed to enter a 1970 Buick Skylark, 2 door, N. Y. license #2817 KF. Your deponent then made an attempt to follow subject, but this attempt was unsuccessful. The subject, Ernest Solomon a/k/a "Ernie", acted in the the following manner: subject drove one block, and then stopped and got out of the car, and waited until every car passed. Subject, Ernest Solomon, a/k/a "Ernie", then re-entered the auto and drove back to the front of 91 Ocean Parkway, County of Kings, and got out of his car and walked a round. The subject Ernest Solomon, a/k/a "Ernie", then re-entered the car above

referred to in this paragraph, and drove south in the direction of Coney.

Island in the County of Kings and then stopped. The subject Ernest Solomon, a/k/a "Ernie", then stopped in the middle of Ocean Parkway and made a Uturn, all the time appearing to be using his rear view and side mirrors.

Because of the suspicious conduct of Ernest Solomon, a/k/a "Ernie", surveillance was broken off.

- 11. Furthermore, your deponent has checked the records of the Consolidated Edison Company of New York and those records supplied by the Security Bureau of the Consolidated Edison Company of New York were found to reveal that apartment 3A of 91 Ocean Parkway, Borough of Brooklyn, County of Kings, are listed in those records as belonging to one "Ernie" Sclomon.
- 12. Based upon my experience as a police officer assigned to the Narcotics Division of the Police Department of the City of New York for six (6) years, and upon my experience as a police officer in the Police Department of the City of New York for six and one half (6 1/2) years. and also based upon your deponent's investigation and surveillance both personally and in the company of brother officers, and upon the information supplied by the reliable confidential informant, lead your deponent to conclude that there is reasonable grounds to believe the subject Ernest Solomon a/k/a "Ernie", is trafficking in the illegal possession and sale of narcotics at 91 Ocean Parkway in the County of Kings. This is based upon all of the facts and information heretofore described particularly with reference to observations made by your deponent and information suppried by the confidential informant. And more particularly there are reasonavie grounds to believe that the use of telephone instrument heretofore (853-8360) as referred to in paragraph nine (9) of this Affidavit is constantly used in furtherance of the illegal sale of narcotics, all in vio-

of Article 220; Dangerous Drug Offenses, of the Penal Law of the State of New York, and that said use of the telephone instrument heretofore described is constantly and repeatedly in use for the purpose of carrying on the commissions of the crimes which subject Ernest Solomon, a/k/a "Ernie", is suspected of committing, and that it is further believed by your deponent that said conversations will be made at any time of the day or night based upon observations and surveillances made by your deponent and brother officers and upon information received from the confidential informant.

attempted on numerous occasions to conduct direct surveillance on said

Frnest Solomon, a/k/a "Ernie", and that all attempts herein have failed

within the period August 8, 1971, to and including September 19, 1971, due

to the particular efforts on the part of said Ernest Solomon, a/k/a "Ernie"

to avoid being seen or detected in person and that all efforts to date made

by your deponent and brother officers to identify said Ernest Solomon,

a/k/a "Ernie", in person have further failed because of said conduct on

on suspect's part. So that normal investigative procedures have been

tried to establish identity of said suspect and have failed or reasonable

appear to be unlikely to succeed if tried or to be too dangerous to em
ploy, to obtain the evidence sought.

the That the investigation is concerned with a crime which is of a continued nature and deponent has probable cause to believe that by the interception of one particularly described incriminating conversation will not deter Ernest Solomon a/k/a "Ernie" in the continued use of the said telephone instrument for the purpose of aiding him in carrying on the commission of the crime aforesaid. It is necessary therefore that any

SXHIBIT B

Eavesdropping Warrant which may be issued herein provide that the interception of messages over the aforesaid telephone instrument not be terminated by the interception of a particularly described conversation but shall continue for a period of Thirty (30) days and for twenty-four hours on each of said days.

Attorney of Kings County, and deponent is fully aware of the fact that the District Attorney will rely upon the truth of the facts alleged herein in support of his application of an Eavesdropping Warrant with respect to the interception of communications being transmitted over the telephone instrument bearing the number 853-8360.

/s/ Edward CodeLia

DETECTIVE EDWARD CODELIA Shield Number 615 Special Investigation Unit, Narcotics Division, Police Department, City of New York

Sworn to before me this

19th day of September, 1971.

/s/ Winifred D. Hutty
WINIFRED D. HUTTY
Notary Public in New York State
Resident in and for Ulster County
Commission Expires March 30, 1973

Resworn 9/19/71 before me John R. Starkey, JSC SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

IN THE MATTER OF THE APPLICATION

-OF-

EAVESDROPPING WARRANT

EUGENE GOLD, DISTRICT ATTORNEY OF THE COUNTY OF KINGS, FOR AN EAVESDROPPING WARRANT PERMITTING THE INTERCEPTION OF COMMUNICATIONS BEING TRANSMITTED OVER TELEPHONE INSTRUMENT

853-8360

EUGENE GOLD, District Attorney of the County of Kings, State of New York, having submitted an application for an eavesdropping warrant with respect to communications being transmitted over telephone instrument 853-8360, and

Upon reading the affidavits of EUGENE GOLD, sworn to the 19th day of September, 1971, and of Detective EDWARD CODELIA, Shield Number 615, sworn to the 19th day of September, 1971, and it appearing therefrom that there is probable cause to believe that evidence of the commission of the crime of Violation of Article 220, Dangerous Drug Offenses, of the Penal Law of the State of New York, may be obtained by interception of communications being transmitted over the telephone instument aforesaid it is determined on the basis of the facts submitted therein that:

There is probable cause to believe that Ernest Solomon, a/k/a "Ernie", has committed, is committing, or about to commit the crime of Violation of Art. le 220; Dangerous Drug Offenses, of the Penal Law of the State of New York, and

There is probable cause to believe that communications concerning the aforesaid crimes will be obtained by the interception of communications being transmitted over said telephone instrument, and

It appearing to the satisfaction of the Court that normal investigative procedures have been tried and failed, and it appearing that said procedures will be unlikely to succeed or too dangerous to be continued, and

There is probable cause to believe that the facilities from which, and the place where, the telephone communications are to be intercepted are being used, or about to be used, in connection with the commission of the Crime of Violation of Narcotic Laws of the State of New York and are continually used by Ernest Solomon, a/k/a "Ernie", whose telephone conversations are sought to be intercepted.

All of which shows to my satisfaction that grounds exist for the issuance of an eavesdropping warrant to intercept the communications of Ernest Solomon, a/k/a "Ernie", transmitted over the aforesaid telephone instrument, it is

ordered that the District Attorney of Kings County and his duly designated agent be, and they hereby are, authorized and empowered to intercept, listen to, overhear, eavesdrop, and make copies and premanently preserve by mechanical or electronic devices the telephone communications of Ernest Solomon, a/k/a "Ernie", transmitted over the telephone instrument bearing the number 853-8360, located at 91 Ocean Parkway, Brooklyn, New York, and listed in the records of the New York Telephone Company in the name of Pricilla Pankey and which communications pertain to the commission of the crime herein above mentioned and it is further

ORDERED that the District Attorney of Kings County and his duly designated agents be, and they hereby are authorized to cut, break, tap and make connection with any and all lines leading to and from the said telephone instrument and to do all things necessary to permit the interception of communications transmitted thereon and for the preservation of said communications by mechanical or electronic devices with authority to make secret entry upon the premises in which the aforesaid telephone instrument is located and to install an eavesdropping device if such entry becomes necessary to execute this warrant, and it is further

ORDERED that any and all intercepted communications recorded and preserved by the District Attorney of Kings County and his duly designated agent shall not be divulged except in accordance with law and when not otherwise privileged by law, and it is further

- 4 -

ORDERED that the effective date of this warrant is the 20th day of September, 1971, and shall not automatically terminate when the communication herein above described shall have been obtained but said interception shall continue until the 19th day of October, 1971, the maximum number of days permitted by statute and the daily interception while this warrant shall remain effective shall be for 24 hours each day and it is further

ORDERED that upon the expiration of the interception the District Attorney or his duly authorized agents without unnecessary delay, file a return in the Court setting forth the time and place of such interception and containing a summation of the evidence or information obtained.

JUSTICE OF THE SUPREME COURT

Dated: Brooklyn, New York County of Kings

September 19, 1971

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF LINGS

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IN THE MATTER OF THE APPLICATION

-of-

EUGENE GOLD, DISTRICT ATTORNEY OF THE COUNTY OF KINGS, FOR AN EAVESTROPPING VARRANT PERMITTING THE INTERCEPTION OF COMMUNICATIONS TRANSMITTED OVER THE TELEPHONE INSTRUMENT BEARING THE NUMBER

NOTICE Pursuant to Section 700.50 Subd. (3), C.P.L.

853-8360

- X

PLEASE TAKE NOTICE that on the September 19, 1971, an Eavesdropping Warrant was issued authorizing interception of telephone conversations on the above-captioned relephone instrument, and that on October 19, 1971, the said Eavesdropping Order was duly extended;

PLEASE TAKE FURTHER NOTICE that the period of authorized envesdropping commenced on the 20th day of September, and terminated on the 27th day of October, 1971;

PLEASE TAKE FURTHER NOTICE that during the period of authorized cavesdropping, conversations were overheard.

Dated: Brooklyn, New York County of Kings

November 1971

Dec. 1. 6

Yours, etc.,

EUGENE GOLD District Attorney Kings County

TO: Pricilla Pankey 91 Ocean Parkway, Brooklyn, N.Y.

Ernest Solomon ---

Raymond Ellington

Basil Jones

Phillip Denny

in a new Conty the Jebberg

11-1-11

BY MR. PASCARELLA:

CROSS-EXAMINATION

Q Mr. Fay, you are aware of the fact I'm sure that Mr. Holt, you are and were aware of the fact that Mr. Holt was under investigation by the United States.

Attorney's Office, is that correct?

As of when?

Q Well, prior to his indictment.

A Very close to the time of the indictment, I became aware that the Eastern District was interested in prosecution involving Mr. Holt. There had been a discussion in the District Attorney's Office concerning the voice of the party on the tape.

Q And you knew Mr. Holt prior to his indictment and prior to your becoming aware of his being investigated, isn't that a fact?

I recognized Mr. Holt when I walked into that room.

I think it's safe to say and Mr. Holt is present here, that

I had no dealings with him that I can particularly recall

except he mentioned a name, Minnie Townes, whom I do recall.

I know I've seen Mr. Holt and he claims he was assigned to

the District Attorney's Office, Criminal Court, but I was

never assigned to the Criminal Court and it would be safe to

say that my recognition of Mr. Holt is more visual than it

A CONTRACTOR MANAGEMENT

arraignment.

- Q The notice of some notice was given to whom?
- A Ernest Solomon I recall visually seeing because I was gathering material on that. I recall comparing signatures
- Q And that is the only one you recollect receiving notice of any kind, is that correct?
- A It's the only photostatic copy of a notice that I recall having seen in the file.
- Q To you knowledge, was Robert Holt ever sent the notice?
- A Robert Holt at that time was perhaps not even identified.
 - Q Well, to your knowledge--
- Λ Ha did not receive written notice at that time. The conversation in question concerns Bobby to Ernie.
- Q To your knowledge, did Mr. Holt ever receive written notice regarding the wiretap?
- I don't think he did until this prosecution began.

 Unless Mr. Holt was contacted by the police, specifically

 I.A.D. who were at that time investigating the reference to

 "Bobby" that was intercepted over this wire, Mr. Holt may

 very well have been contacted and informed. It was a belief

 that he was the speaker.
- Q To your own knowledge you don't know. You're just guessing as to what very well may have happened.

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A I think I recall discussing this case with Inspector Nevins(phonetic) who contacted I.A.D.

- Q When was that?
- A Sometime after the conversation was intercepted.
 - Q Who is Inspector Nevins?
- A Inspector Nevins is the party in charge of the District Attorney Squad, Kings County.

In other words, he supervises the police who are assigned to that District Attorney's Squad.

Q Now, why at that particular time, if you know, would Inspector Nevins notify Internal Affairs Division of the Police Department?

MR. KAPLAN: I'm going to object to that question as being speculative. It's not within the knowledge of Mr. Fay to answer questions about why some other prospective witness might do something.

MR. PASCARELLA: I would submit that Mr. Fay has been surmising a lot of things in his testimony and this is just following along those lines. But I'll ask the question another way.

Q To your knowledge, was there any reason for anyone notifying Internal Affairs Division of the Police Department?

And what was the reason?

His voice was identified as perhaps being that of a Robert Holt who was working in the Criminal Court.

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Q . And when was that? When did that

identification take place?

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him?

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Sometime after the interception. As I've stated before, it's customary to have recordings of the interceptions delivered on a daily basis to the District Attorney's Office. The tapes are then played and reviewed. Someone in the District Attorney's office said, "I think that's Robert Holt who's a police officer assigned to the Criminal Court." Do you know who that someone was who identified

To the best of my recollection, it's Anthony Schembri.

Do you know how to spell that?

It's S-C-H-E-M-B-R-I.

Do you know where he is now? Q

District Attorney's Office.

Do you know approximately when he made this identification?

Whenever the tape was played, which may have been a day two, three. I couldn't give you a date on that.

So it was within close proximity to October, 1971

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3 A I'm not sure

Q Now, are you aware of anything that happened with regard to this possible identification of a voice being on this wiretap as being Mr. Holt's voice?

A It was routine then because Mr. Holt was a police officer to contact the Rackets Bureau in our office and the case is then handled by I.A.D.

Q Well, did you ever consider handling it as part of a narcotics prosecution?

MR. KAPLAN: I'm going to object to this.

I'll ask that the last answer be stricken.

MR. PASCARELLA: On what basis?

MR. KAPLAN: As to whether he ever considered something, as his state of mind--

MR. PASCARELLA: Who else can testify as to his state of mind except him?

MR. KAPLAN: No, on a speculative issue as to whether he might have considered something, it has no relevancy to the direct testimony here --

MR. PASCARELLA: It does.

MR. KAPLAN: --which was relating specifically to the relationship with Calvo and Codelia.

MR. PASCARELLA: Well, the point of the matter is

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Addition to be different and the

Mr. Fay has indicated that he was interested in Narcotics prosecutions, and he had indicated to the extent of his interests getting the wiretap order, speaking with various people trying to get various people arrested to cooperate and here he has a possible identification of someone who is on the wiretap presumably talking about narcotics and has not prosecuted him or looked into prosecution. I think it's a perfectly valid question to ask.

MR. KAPLAN: He said he could not identify the voice of Mr. Holt. That it later turns out that there was no positive identification.

MR. PASCARELLA: Are you testifying or-MR. KAPLAN: No, he'll answer that question.

I think it's all speculative as to what he might or
could have done.

Q No, you I'm talking about.

A I am assigned to the Narcotics Bureau. Corruption cases involving police officers are to be transferred to the Rackets Bureau to I.A.D.

Q But isn't this also a narcotics case?

A No, not under the terms of the District Attorney's--

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Q And isn't Mr. Raymond Ellington also a policeman?

A When Raymond Ellington was involved, he was a police officer who was involved in a major narcotics investigation.

That case also then actively as soon as he was identified as a police officer, I.A.D. was called in on that case.

Q That may be correct, but didn't you also go ahead and prosecute Raymond Ellington who was a police officer at that time?

A In conjunction with three narcotics violators, he was prosecuted. The case was not severed.

Q But you didn't prosecute or seek to look further into your own prosecution of Mr. Holt in conjunction with four narcotics violators, is that correct?

Yes, I did.

Q You did then?

A I did contact the Rackets Bureau. I said we have a tentative identification of a police officer who was involved on this tape and I.A.D. was then notified.

Q Mr. Fay, the question goes to your dealing with a narcotics violation and not something that you could refer to the Rackets Bureau. We have here a situation where Mr. Ellington was a policeman who you prosecuted for narcotics violation and Mr. Holt is also a policeman. Is there any reason you did not prosecute him for

narcotics violation?

A Mr. Ellington was identified at the time of the extension order towards the end as being a police officer at which time I.A.D. was notified which is customary office procedure.

Q I understand that.

A Mr. Holt was a tentative identification of a man whom I don't know and cannot identify his voice. My orders from the District Attorney's Office are corruption cases are to be handled by the Rackets Bureau and I.A.D.

Q Well, did you make any attempt to find out further about Mr. Holt being a possible narcotics violator based on a wire interception?

A I don't do that.

Q Well, wasn't that done based on wire interception, wasn't the prosecution of Mr. Ellington based?

A The distinction I'm drawing is between the case where the subject of the case was Ernest Solomon who was not a police officer and not a corruption case. That remained my case. When Nitty was involved in the case, it was close to the termination of the case. I.A.D. then came in on the case.

Q Well, didn't you find out about Pobert Holt being a possibility before you went to indictment?

Q So wasn't it before the termination of the

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A I was informed of the identification by I.A.D. It was insufficient to indict at that time.

- Q In fact didn't you find out that it was Raymond Ellington, a policeman, from Mr. Solomon after he was arrested?
- A I don't quite understand the question.
- Q Wasn't that your testimony? That Mr. Solomon told you that it was Raymond Ellington?
- A No. At the time the arrests were made, I knew that Ellington was a police officer. I didn't depend on Solomon to inform me that Nitty was Raymond Ellington.
 - Q He did tell you that?
- A That he was aware of the fact that he was a police officer? Yes.
- Q And still you decided to treat that as a violation of the narcotics laws as well as referring to the corruption unit, is that correct?
- In Ellington?
 - Q In Ellington.
- A With Ellington as soon as he was identified as I've stated before, as a police officer I'm required to contact

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I.A.D. which I did. I was allowed to keep the case because three of the people are violators who are not policemen.

Q Couldn't Holt be considered part of the same case since he was on the same wiretap of Ernest Solomon's telephone and presumably engaged in a drug conversation?

A No, because our case of course involved conspiracy and basic underlying charges which are on the indictment concerning Ernest Solomon and three defendants. Robert Holt's case does not go from the beginning of this wiretap to the end of this wiretap. Holt is a particular spin-off, which I couldn't indict them all together under the State laws.

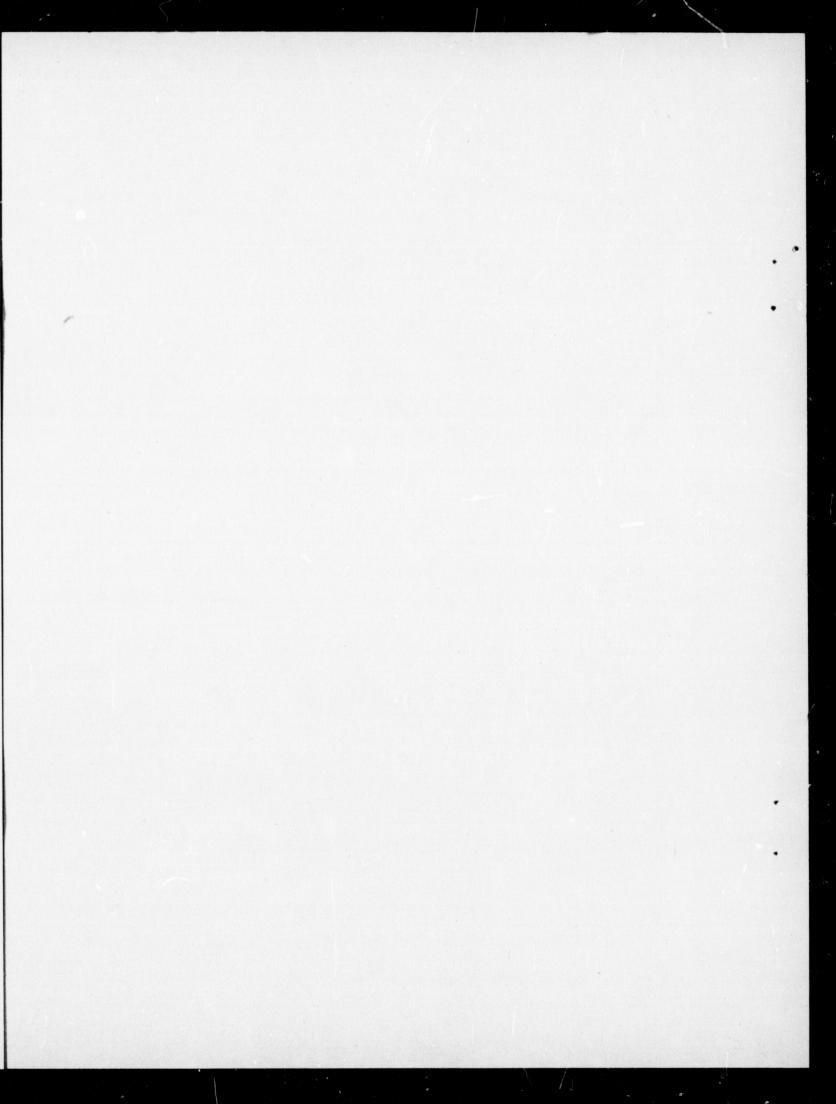
Certainly not. I could not have included Holt during the period of that indictment.

"Q And Holt couldn't have been included in a substance--

MR. KAPLAN: I'm going to object to this as argumentative. We're arguing on the law here. What they could have done is not the question. It wasn't done.

MR. PASCARELLA: What I'm trying to elicit is why with one police officer it was made both an Internal Affairs Division case and a narcotics prosecution case, and with another police officer, it was not made a narcotics prosecution—





MR. KAPLAN: Because if it is developed as a conspiracy here, it's quite obvious. I'm going to object to--this is just one conversation that we're talking about. There was no other evidence. It's obvious at this time. I'm going to object to any further inquiry on this matter.

MR. PASCARELLA: Well, the testimony was that there were two different conversations in which someone named "Bobby" was involved or "Bob" was involved which Mr. Fay testified to.

MR. KAPLAN: I'm just going to object to any arguments about what they could have done.

I think it's been explored sufficiently.

MR.PASCARELLA: It's not so much what they could have done. I'm trying to find out the reason why they didn't.

MR. KAPLAN: The reason is irrelevant what they did or what they could have done. It has nothing to do with the hearing which is suppression of a tape.

I think its been explored.

MR. PASCARELLA: I submit that it is relevant but this is about as far as we can get with it anyway.

The fact of the matter is that you never

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prosecuted or thought to prosecute Mr. Holt as a marcotics violator?

As an Assistant District Attorney assigned to the--

MR. KAPLAN: I'm going to object to the question as to what he thought to do and ask that it be restricted as to what was done.

MR. PASCARELLA: The witness is capable of testifying as to his own thoughts and his own state of mind. He's the only one who can do that. It's a proper question to ask.

MR. KAPLAN: All I'm saying is it's speculative as to what might have been done.

MR. PASCARELLA: Not what might have been done.

No, what he thought of doing. He had a reason for not doing--

MR. KAPLAN: What relevancy does this have to do with the suppression hearing?

Q You were in charge of the narcotics investigation, weren't you?

A That's a fair statement to make, at this particular investigation concerning Solomon, yes.

Q And wouldn't you have had authority to decide who the defendants should be in the case?

A No.

	Q W	ouldn't	you have		ve a	authority		to recommend	
								e de la companya de l	
the	defendants	should	be	in	this	case?			

- Only particularly narcotics cases.
- Q And did you ever recommend that Robert Holt be a defendaat in a narcotics case?
- A Our orders--
- Q Did you ever recommend? That's all I'm asking.

 Not what your orders are.
- A My recommendation went as far as recommending an investigation as a result of what I heard.
- Q Did you ever recommend this is just s simple question that Robert Holt be prosecuted in a narcotics case? That's all I'm asking.
- A Recommend to whom, Mr. Pascarella?
- Q To anyone who is in the position of authority to make a determination who should be prosecuted since you couldn't do it yourself?
- A I recommend that the case be investigated by the head of the Rackets Bureau.
- Q But did you ever recommend that Mr. Hold be investigated with regard to a narcotics prosecution?
- A But of course. Transferring it into the Rackets

 Bureau with statements and investigation requests are as far

 as you go to recommend that a case--

Q But who determined that Police Officer Ellington be included in your narcotics case?

MR. KAPLAN: I'm going to object as being asked and answered.

MR. PASCARELLA: No, he hasn't answered the question.

MR.KAPLAN: What relevancy does this have to do with the wiretap, with the suppression of a wire ap? That's the inquiry here. We're talking about Codelia's affidavit and the reliability of Calvo. That's the direct testimony. This is going beyond. I submit that it has been asked and answered. I'm going to object and ask that he not answer the question.

MR. PASCARELLA: Well, we've gone beyond the wiretap in other testimony that we have taken. We have gone beyond the four corners of it.

Contract the second

MR. KAPLAN: Only in support of the position. that the affidavit was a valid one. Now, what does this have to do with the validity of this affidavit and this wiretap? He's answered the question.

MR. PASCARELLA: It has a lot do with the validity if there were other members who could be prosecuted in a warrant. There must be a reason why.

And it could relate very well to the goings on of

McLean and the others who were shaking down Solomon.

It could have been a conscious attempt not to go
beyond those who were already there.

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MR. KAPLAN: The question was asked and answered. If you have other questions, pose them to him.

MR. PASCARELLA: The question that I don't think was answered was simply this. He keeps telling me he referred to the Rackets Bureau.

Did you ever recommend that Robert Holt be

prosecuted for a narcotics violation by your Bureau?

A Mr. Pascarella, as I've stated I didn't know Bobby

Holt. I did not recognize the voice. What I'm required to

do by the orders of the District Attorney's Office is, if

it's corruption to transfer it into the Rackets Bureau.

Now by starting that and beginning an investigation, that's how I recommend. I do not order the head of the Rackets Bureau or order Gold to start it and I'm prohibited from going ahead with it.

Q Do you only prosecute cases where you know the defendant?

MR. KAPLAN: I'm going to object. I'm going to object. It's highly argumentative and I'm going to object. It's been asked and answered.

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- Q Do you know when he died?
- A The exact date I wouldn't know.
 - Q Do you know how he died?
- A Of natural causes in California.
 - Q Do you know what those natural causes were?
- A It's related to diabetes.

His body was exhumed here in New York.

- Q Are you aware of the reason why it was exhumed in New York?
- A It had something to do with our request.

 Calvo, dying out of a jurisdiction and being such an important informant, we were interested in knowing exactly whether or not there was any foul play on that case.
- Q And did you reach any conclusion as to whether or not there was foul play based on the exhumation of the body?
- A Well, of course it was depended on the medical examiner's report as that it was of natural causes. He had been certified as dying naturally in California.
- Q Do you know of any police department investigation of Robert Holt that took place before the federal indictment?
- A The investigation that I was referring to was

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that.

Nevins of I.A.D. I assume it was something that happened on

Q Are you aware of any outcome of that investigation?

A I never read the final reports on that. That would have stayed in the Rackets Bureau or I.A.D. I assume with I.A.D. They then request that there be an indictment.

Q Well, as a result of any investigation taken of Holt, you were never directed to proceed with the narcotics prosecution?

A I wouldn't be. It would be against a police officer who would be independent of a narcotics investigation.

I was not so ordered.

Q Earlier on direct examination when you spoke of informant Calvo, you used the name John Calvo. Isn't it correct that his proper and correct name was Joseph Calvo.?

A Yes. I was stating in the beginning that he had several names that I was aware of. Some of them were euphemisms that would be used to cover his true identity and when he was being referred to. Others were names he would call himself. Some were his street names.

Q Well, what type of name was John?

His true name--John Calvo was actually the name of a

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MR. KAPLAN: That was a factual dispute, if that's what you're saying. That's conceded. - that there was a factual dispute.

MR. PASCARELLA: Okay.

- Q What was the outcome of the Solomon case which was the case that was the subject of the wiretap order we now have before us?
- A Dismissed.
 - Q When was that dismissed?
- A Approximately the same time that Hines was dismissed.
 - Q What was the basis for dismissing that case?
- A Same reasons stated for Hines.
- Q Well, who--in the interests of justice, is that the reason?
- A I didn't do the actual dismissing of that case. I did not recommend to the Court that that case be dismissed. It was, if I'm not mistaken, Arnold Taub.
 - Q Well, who did?
- A Taub.
- Q And that case was dismissed on May 28, 1975, is that correct?
- A That could be. Do you have the minutes there?
- Q Yes, I do. And isn't it a fact that Mr. Taub stated that--

I was never present. I have never read the minutes.

Q Well, did Mr. Taub ever discuss with you the basis for dismissing it being that at least one police officer lied in the Grand Jury with regard to the case?

MR. KAPLAN: I'm going to object, Mr.

Pascarella. I'm going to ask that if you're reading

MR. PASCARELLA: I'm not reading from anything.

MR. KAPLAN: It appears that you are reading from some document.

MR. PASCARELLA: It could appear, but I'm asking him a particular question whether Mr. Taub had spoken to him about that.

THE WITNESS: About that he was going in and going to dismiss because it was a lie stated on the record?

from anything that it be marked.

Yes.

A I was unaware of the exact statement made by Taub.

He did not tell me what he was going to go in--

Q Well, this is your case, is that a fact? You've said all along that--

Your analogizing to the Eastern District--

Q No, no. Wait.

A It's not my case.

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Q All right. You were in charge of the prosecution of the case. You had basic responsibility, isn't that correct?

A I was assigned the hearing.

Q Okay. Now, Mr. Taub wasn't assigned to this case, was he?

A I don't think he was in the office when the case arose.

Q Now, you were the one as you testified before who handled most of the matters with regard to this case?

A That's correct.

Q But when it came to the dismissal, Mr. Taub went to dismiss it, is that correct?

A These dismissals took place almost simultaneously.

I went to one Court and Taub went to another.

Q But it wasn't the same day, is that correct?

It could have been. It was the same day, I think.

Yes, it was the same day.

Q Is it your testimony that Mr. Taub did not discuss the dismissal of the Solomon case with you? .

A In the course of the conference that you referred to before the Solomon case was discussed. Did Mr. Taub discuss with me what he was going to do and say prior to walking over and doing it?

Q Well, did Mr. Taub discuss with you that the

A I was aware that it was going to be dismissed.

It had been determined at that conference.

- Q And did you discuss the reasons for the dismissal?
- 6 A At the conference.

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- Q Oh. So you have discussed--
- A The conference that you are referring to concerns

 Solomon and Hines.
 - Q So you have discussed the reasons for the dismissal of the Solomon case?
 - A Yes. Now did Taub specifically discuss it with me?

 No. But it was discussed at a meeting, the conference referred to, by all the participants.
 - Q So then you were aware of the fact that--
 - A That it was to be dismissed? Yes.
 - Q Were you aware of the reasons it was to be dismissed?
- 19 A Yes, I knew.
 - Q What do you recall to be the reasons for the dismissal?
- 22 A The reasons for the dismissal were provided me by Mr. Kaplan.
 - Q And what were the reasons?
 - A Those reasons I passed on to Mr. Gold and all the other

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people who were participants.

A Mr. Kaplan had indicated to me that he had information from one of the police officers by the name of Luis Martinez that may in fact have pertained precisely to the Grand Jury minutes as stated on that case and that was that Mr. Martinez was to have observed the narcotics in one place when it may have been in another place.

(At which point, there was a recess until 3:15 P.M.)

Time noted: 2:30 P.M.

* * *

Resuming at 3:15 P.M.

MR. PASCARELLA: I think the record should indicate that there has been a slight hiatus in the testimony. Mr. Kaplan had to go before another judge on another matter. We are continuing the questioning.

I believe the last question related to the reasons for dismissal in the Solomon case and Mr. Fay related that they were reasons in part told to you by Mr. Kaplan of various matters or untruths purportedly committed by Police Officer in the Grand Jury, is that correct?

A Yes. I haven't spoke to the police since the time of the indictment so the information I received was from

them or if they would deliver them.

Q Well, in preparation for the trial and the hearing proceedings in the Solomon case, did you ever have occasion to see any reports of Viera or Codelia?

A Yes. I can't though testify that I recall specific instances stated on the report but I did subpoena the case folders, etc. I also had activity reports.

, Q . But reports were written?

A Yes.

Q Were these reports references made to Robert Holt?

A I don't recall. My specific interest in--

Q No. I'm talking about the reports that you saw. Was there any reference to Robert Holt?

A Yes, but what I'm telling you is that I was preparing a case against four defendants. What I would be interested in is the particular reports that I would need for my case.

Q I understand that. But were the reports that you saw, was there any reference to Robert Holt?

A I don't recall having seen it. There may be. I just don't recall.

Q Well, were there reports submitted to you by any of these officers after the beginning of October 1971?

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A But of course I continued working with them. As to what please?

O · Excuse me.

A After what?

Q Well, did you ever see any of their reports that were written subsequent to the beginning October, 1971?

A Yes. I had hearings as to the original application and the extension order.

Q After the voice of Robert Holt was allegedly identified in two conversations of early October 1971, did you ever see any reference to Robert Holt's name in any of the reports that you reviewed of any of these officers, namely McLean, Viera and Codelia?

I may very well have. I paid no attention to it.

Q Do you know if you did or not?

A I don't recall. I recall having seen Holt's name written and I recall having discussions concerning the progress of the Holt"investigation" with I.A.D., But my information was obtained through Assistants in the Rackets Bureau and a man from I.A.D.

Q Well, were these reports and the information you are referring to now ever referred to the United States Attorney's Office for the Eastern District?

I wouldn't know.

Q Did you ever provide any of your reports or any part of your investigation information to the United States Attorney's Office for the Eastern District?

As to whom?

Q As to Mr. Holt and as to Mr. Solomon?

A I gave a great deal of information. I gave folders and materials.

MR. KAPLAN: Can we have a time in question?

MR.PASCARELLA: Well, at any time. From the time

you commenced investigation of Mr. Solomon and

from the time Mr. Holt's name was mentioned. Any

time from the beginning of that information until

the present time.

A There were other investigations of course arising from investigations concerning these police officers. There were different items requested by the Eastern District, the Southern District, etc. Information was given to them.

What precisely was given, I don't recall. There would be a receipt for materials handed.

Q Did you personally supervise any of the turning over this material to the United States Attorney's Office?

A Some. I went and got myself some; Andrew Garson who is assigned to the Bureau was told to get.

Q To your knowledge, were any of the reports of

Codelia, Viera or McLean turned over to the U.S. Attorney's Office?

What are the reports of Codelia--

Q Any of their official police reports regarding the Solomon investigation in any way?

A I didn't turn them over. I don't have them.

Q To your knowledge, did your office turn them over?

A They would be in S.I.U. My office could not have turned them over if we did not have them.

Photostats I think I have of some of the material. I don't recall whether or not that was handed over. Only on particular issues that I was interested in in the hearing.

Q Now, you testified that when Solomon was arrested sometim in October 1971, he started to cooperate with your office, is that correct?

A There was a primary indication that he wanted to cooperate.

Q Didn't you in fact say that he attempted to verify for you certain aspects of the affidavit in support of the wiretap?

A Yes, but Mr. Solomon primarily indicated to us that he would be willing to cooperate. Then in order to protect him, the routine procedures were going through in terms of

arraignment with the three co-defendants. Subsequent to that date, he requested to appear again at the District Attorney's Office on several occasions. I had discussions with Ernest Solomon concerning the matters in this wire While he was even in prison, he requested to come over to speak to us.

Q Didn't you testify that he aided you in explaining to you various other matters including observations that were made and verified various items of observation which are stated in the affidavit?

A Yes. It is customary to discuss with a defendant what you know of the defendant; and so I was discussing observations that the police had made with this defendant.

Q In fact according to your testimony he even told you that Phillip Denny was a mule?

A Yes.

Q Did he ever tell you anything about Robert Holt?

A He may have.

Q You don't recall him telling you anything?

A I discussed at least ten, fifteen, twenty people with Ernest Solomon. We were running through potential investigations that Solomon could be the informant for.

Q Do you recall at this time whether or not he said anything about Robert Holt?

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No, I don't recall whether he did or didn't.

Q Did you ever ask him about Robert Holt?

A I don't even recall that. But I.A.D. was present for part of the questioning with Solomon. I'm sure that was one of their primary concerns.

Q Could it also have been a concern of theirs that Raymond Ellington who was indicted--

A Oh, those two cases overlapped of course.

Q Mr. Fay, you testified on direct that Solomon made certain statements to you which have just been referred to and you also testified that your office has these statements of Mr. Solomon, is that correct?

A No. I testified that a statement was taken officially with the stenographer present when he was arrested, which is customary to advise him of the rights on the record. And if I'm not mistaken, Ernest Solomon said, "I don't choose to make any statements" and that was that. What I had indicated previously was that while he was also present and others who were defendants on the case were being questioned, he indicated that he would like to cooperate on the case.

Q And when Mr. Solomon was telling you various aspects of this case and other matters, for indeed you said Mr. Solomon was informant in the Stacy Hines case, you made no notes or no one made any report of his staement?

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were authorized to make sometime after September 19, 1971. When did the actual interceptions begin? Q That's correct. They would begin generally the day following the application. Do you know in this particular case when it was begun? A I would assume it began on the day that it was authorized. It was signed the evening before. Q For how long a period during the day were the conversations to be intercepted and monitored? For how long a period? Q A period during each day. They're permissible for twenty-four hours a day. And to you knowledge, was this done twenty-four hours a day?

Yes. In this instance, this case was monitored twentyfour hours a day. Calls were intercepted.

Q And for how many minutes were these calls: monitored?

From the time of the granting of the first application until the day of arrest, which would extend into the period of the extension order.

NOw, was notice given to the individuals who appeared on the tape pursuant to Section 700-50.D. of the

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MR. PASCARELLA: I would also request transcripts of those conversations.

MR. KAPLAN: What conversations?

THE WITNESS: All of the conversations I think he is referring to that we intended to use as against evidence against Ernest Solomon and the three others. On what grounds are they being requested?

MR. PASCARELLA: Mr. Fay, you're a witness.

MR. KAPLAN: We're not going to concede that they should be turned over at the time. The question's irrelevant. Certainly, they might be made available from the District Attorney's Office if the District Attorney's Office is so inclined to have them made available at their convenience.

Now, to your knowledge were all the conversations that were made on the telephone within the twenty-four hours for the period of time that the wire was in existence, were all these conversations listened to?

Yes they were.

Do they logs reflect this? Q

Listened to and the logs reflect also the statements made by the police as to what they saw are the gist of the conversation. The logs don't reflect verbatim the conversation in question.

Q

And was that the basis of his becoming an informant,

Transcript of conversation on 10/1/71

E - ERNIE B - BOB

E Hello

- B Hey Bob
- E Huh
- B Bob
- E Who?
- B Bob
- E inaudible , oh how are you doing?
- B. Okay, you got anything?
- E Huh
- B You got anything?
- E inaudible
- B Is Ernie there?
- E Talking to him
- B Oh, hey you got that for me?
- E Huh
- B You got that thing for me?
- E No, aaaa tonight, you know
- B Okay, about what time?
- E Aaaa you going to be down there?
- B Yeah
- E Alright, I'll call you
- B Aaaaa, I'll tell you what to do Ernie.
- E What's that baby
- B Let me have the big one
- E Okay
- B Okay?

- E Yeah
- B I'll be down there about say about 12
- E Okay
- B Okay?
- E Bye

Transcript of conversation on 10/4/71

E - ERNIE B - BOB

- B Hello, Hello Bob
- E Huh
- B Bob
- E Oh yeah, how are you?
- B Are you going to bring that thing with you tonight?
- E Huh?
- B are you going to bring that thing tonight?
- E Out
- B Out?
- B Out
- E Out?
- E Yeah
- E What happened to you last week?
- B I came there, you didn't show
- E Huh
- B I came down, your sister told me you were sick.
- E Who?
- B inaudible
- E Yeah well I seen you since then
- B Huh
- E I seen you since then though haven't I?
- B No, Saturday night
- E Huh
- B That was aaaa Friday night
- E Yeah I was there Saturday night, I was there Friday and Saturday night.
- E I was there . . .

- B Saturday night I was at work
- E I was there Friday, Saturday and Sunday. I haven't seen you since aaaa
- B Friday night you were supposed to come and you were supposed to be home sick. You had something wrong. Your throat was bothering you a bit.
- E Yeah I got there late, got there late
- B Oh
- E Yeah, aaa so some time tonight
- B Huh
- E Some time tonight or tomorrow I think.
- B Okay, I'll be down there later on
- E I'll wait on your phone call, alright I'll talk to you later
- B Okay
- E Bye

AFFIDAVIT OF MAILING

STATE OF NEW YORK COUNTY OF NASSAU, ss:

HERTHA CLAIRE ADELSON TROTTO, being duly sworn, deposes and says that on the 10th day of December, 1975, I served a true copy of the annexed Appellant's Brief and Appellant's Appendix on the Office of the United States Attorney, Eastern District of New York, by depositing the aforesaid true copy enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York, such wrapper being directed to the person, hereinafter named, at a place and address stated below:

Hon. David G. Trager United States Attorney United States Court House 225 CAdman Plaza East Brooklyn New York 11201

Hertha Claire adelson Trotto

Sworn to before me this

JAMES A. PASCARELLA
Notary Public, State of New York
No. 30-4602169
Qualified in Nassau County
Commission Expires March 30, 127



